89-1525

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

———

NOBEL-SYSCO FOODS SERVICES CO.,
Petitioner,

v.

WILBUR TOLEDO,
Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

———

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QUESTIONS PRESENTED

1. Whether, in a Title VII religious discrimination case, an employer is foreclosed from attempting accommodation after an initial refusal to hire?

2. Whether the Court of Appeals erred as a matter of law in holding that an employer must establish that accommodation is impossible in order to establish undue hardship in a Title VII religious discrimination case?

LIST OF PARTIES

The caption contains the names of all parties to the proceedings before the United States Court of Appeals for the Tenth Circuit.

Petitioner, Nobel-Sysco Foods Services Co. is a corporation organized under the laws of the State of Colorado, whose principal place of business is Denver, Colorado. Sysco Corporation is the parent corporation of Nobel-Sysco Foods Services Co. The following are also subsidiaries of Sysco Corporation.

Allied-Sysco Food Services, Inc. * 2nd Tier Subsidiary
Arrow-Sysco Food Services, Inc.
Bell/Sysco Food Services, Inc.
Deaktor/Sysco Food Services Company
DiPaolo/Sysco Food Services, Inc.
Foodservice Specialists, Inc.
Glencoe-Sysco Food Services Co.
Grants-Sysco Food Services, Inc.
HFP-Sysco Food Services, Inc.
Hardin's-Sysco Food Services, Inc.
K.W. Food Distributors Ltd.
Koon-Sysco Food Services, Inc.
Lankford-Sysco Food Services, Inc.
Maine/Sysco, Inc.
Major-Sysco Food Services, Inc.
Mid-Central/Sysco Food Services, Inc.
Miesel/Sysco Food Services Co.
*Miesel/Sysco Food Service Company (12/27/89)
*Sysco Food Services of Cleveland, Inc. (12/27/89)
Nobel/Sysco Food Services Co.
*Sysco Equipment & Furnishings Co.
Olewine's-Sysco Food Services Company
Robert Orr-Sysco Food Services Co.
Pegler-Sysco Food Services Company
*Food Service Transportation, Inc.
*Pegler-Sysco Transportation Co.

Sysco Food Services of Eureka, Inc. (01/10/90)
Sugar Foods, Inc.
The SYGMA Network, Inc.
Sysco/Avard Continental Food Services, Inc.
Sysco/Continental Food Services of Pittsburgh, Inc.
Sysco/Continental Food Services of Portland, Inc.
Sysco/Continental Food Services of Seattle, Inc.
Sysco/Continential Institutional Food Services of Macon, Inc.
Sysco/Continental Keil Food Services, Inc.
Sysco/Continental Mulberry Food Services, Inc.
Sysco/Continental Smelkinson Food Services, Inc.
Sysco Food Services, Inc.
Sysco Food Services of Arizona, Inc. (01/08/90)
Sysco Food Services of Atlanta, Inc.
Sysco Food Services of Beaumont, Inc.
Sysco Food Services of Central Florida, Inc.
Sysco Food Services of Indianapolis, Inc. (02/22/90)
Sysco Food Services of Iowa, Inc. (01/08/90)
Sysco Food Services of Los Angeles, Inc. (01/08/90)
Sysco Food Services of Minnesota, Inc. (12/28/89)
Sysco Food Services of South Florida, Inc.
Sysco Food Systems, Inc.
Sysco/Frost-Pack Food Services, Inc.
Sysco/General Food Services, Inc.
Sysco/Louisville Food Services Co.
*Sysco Food Services—Chicago, Inc. (12/15/89)
*Sysco/Louisville Food Services Co. (12/27/89)
Sysco/Rome Food Service, Inc.
Vogel/Sysco Food Service, Inc.

Divisions

Baraboo-Sysco Food Services
Cochran/Sysco Food Services
Global/Sysco
Hallsmith-Sysco Food Services
Sysco Food Services—Jacksonville
Sysco Frosted Foods—Albany

Sysco Frosted Foods—Horseheads
Sysco Frosted Foods—Syracuse
Sysco Intermountain Food Services
Sysco Military Distribution Division
Theimer-Sysco Food Services
Thomas/Sysco Food Services

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases Page

Other Authorities

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OPINIONS BELOW

The opinion and judgment of the District Court is reported at 651 F. Supp. 43 (D.N.M. 1986) and is attached to this Petition as Appendix A. The opinion and judgment of the United States Court of Appeals for the Tenth Circuit is reported at 892 F.2d 1481 (1989) and is attached to this Petition as Appendix B.

JURISDICTION

Jurisdiction to review the decision of the United States Court of Appeals for the Tenth Circuit in this civil case by Writ of Certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1988). This Petition for Writ of Certiorari is filed within the ninety-day period prescribed by

28 U.S.C. § 2101(c) (1982) and computed in accordance with Rule 20.4 of the Rules of the Supreme Court of the United States.

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(i) provides in pertinent part that (a) it shall be an unlawful employment practice for an employer "(1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion."

Title VII further provides at 42 U.S.C. § 2000e(j) that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

29 U.S.C. § 626(b) outlines the enforcement provisions of Title VII and requires: "Before instituting any action under this Section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Chapter through informal methods of conciliation, conference, and persuasion." Subsection (d) provides: "Upon receiving (a charge alleging unlawful discrimination), the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

The Department of Transportation Regulations codified at 49 C.F.R. § 392.4 (1983) provide: "No driver shall

be on duty and possess, be under the influence of, or use, any of the following drugs or other substances: (1) any schedule I drug or other substance identified in Appendix D to this subchapter; . . . (4) any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle."

Department of Transportation Regulations 49 U.S.C. § 391 *et seq.* provides that, effective January 1, 1989, motor carriers and persons who operate commercial motor vehicles engage in a controlled substance testing program as described by the act. Relevant portions of the act include:

§ 391.81(a) "The purpose of this subpart is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage."

§ 391.93: "Motor carriers with fifty or more 'drivers subject to testing' are required to implement a controlled substance testing program. . . ."

§ 391.105(a) "A motor carrier shall require a driver to be tested once under the requirement of this section for the use of controlled substances during the first medical examination of the driver after implementation of the drug testing program. § 391.105(c) "A motor carrier may discontinue periodic testing after the first calendar year when the motor carrier has implemented its random drug testing program according to the implementation schedule and, therefore, is testing fifty percent of the drivers subject to testing under its random drug testing program."

§ 391.109(a) "A motor carrier shall use a random selection process to select and request a driver to be tested for the use of controlled substances."

STATEMENT OF THE CASE

Respondent, Wilbur Toledo ("Toledo") applied in March 1984 for a truck driving position with Petitioner Nobel-Sysco Food, Inc. ("Nobel-Sysco"), a restaurant supply corporation that distributes food, supplies and equipment in several Western states. Nobel-Sysco sought an experienced tractor-trailer driver with mountain driving experience to drive an 18-wheel tractor-trailer on mountain roads to and from Farmington, New Mexico, delivering to restaurants in towns in Northern New Mexico and Southern Colorado. The position required the driver to work six days a week, but to be available seven days a week for the occasions on which a delivery was due out of Farmington on a Sunday.

When he applied for this position, Toledo was told that the application process included a physical examination and a polygraph test to inquire about drug use because Nobel-Sysco and Ryder Truck Rental, from which Nobel-Sysco leased trucks, had policies against having drug users as drivers. During his interview, Toledo stated that he was a member of the Native-American Church and used peyote in church ceremonies. He told the interviewer that he used peyote twice in the past six months or "whenever a group of us gets together." Nobel-Sysco officials, believing that Nobel-Sysco would be in violation of the Department of Transportation regulations, would assume an unacceptable risk of liability and would face cancellation of its lease with Ryder if it hired a known user of peyote, refused to hire Toledo.

Toledo filed a claim of discrimination with the New Mexico Human Rights Division, following which Nobel-Sysco made two accommodation attempt offers through the New Mexico Human Rights Commission.

The second of these offers required that Toledo complete all of the standard pre-employment requirements, notify Nobel-Sysco at least one week in advance of a

scheduled religious ceremony, take a day off following any ceremony and agree to be assigned to the Albuquerque office so that he could be under direct supervision. This proposal required that Toledo complete the required driving test, written test, the Department of Transportation physical and polygraph test with regard to usage of any other illegal drugs. This offer also included an offer of $500 backpay. Toledo rejected this offer and did not make a counterproposal, although Nobel-Sysco requested of Toledo's counsel that he forward a counterproposal.

Toledo took the position from the outset and through trial that he should have been hired by Nobel-Sysco as a truck driver with no restriction or condition placed upon him concerning the use of peyote. Expert testimony at trial demonstrated that Toledo's peyote intake during ceremonies would vary from 1.6 to 6.4 milligrams of mescaline (the main psychoactive alkaloid in peyote) per kg of body weight. Experts who testified at trial agreed that a person ingesting more than 1 milligram of mescaline per kg of body weight should not drive a truck for at least 24 hours after having ingested the peyote.

Following a bench trial, the District Court concluded that Toledo had established a prima facie case of religious discrimination under Title VII, but that the employer's July 10, 1984 offer to accommodate this practice was a reasonable accommodation within the meaning of Title VII, and that this reasonable accommodation absolved Nobel-Sysco from liability for the discriminatory decision not to hire Toledo when he refused to cooperate with the accommodation offer.

The United States Court of Appeals for the Tenth Circuit reversed, finding that settlement offers made during administrative proceedings do not qualify as reasonable accommodation under the religious discrimination provisions of Title VII. The Court further found that when he refused to participate in the conciliation effort, Toledo did not fail in his duty to cooperate with Nobel-Sysco's efforts to accommodate his religious practice because the

accommodation offer came after the initial unlawful refusal to hire. The Court held that an employer who has made no efforts to accommodate the religious belief of an employee or applicant before taking action against the employee applicant may only prevail if it shows that accommodation was impossible and that, absent this showing, failure to attempt some accommodation would breach the employer's duty to initiate accommodation of religious practices. Finally, the Court rejected Nobel-Sysco's arguments that the risk of increased liability created by hiring Toledo would impose undue hardship, finding that Nobel-Sysco had not shown that accommodation without undue hardship was impossible.

REASONS TO ALLOW THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF NATIONAL INTEREST REGARDING FEDERAL ANTI-DISCRIMINATION LAW WHICH NEED RESOLUTION.

The court of appeals recognized that this case presented a question of first impression concerning whether an employer's offer to hire in conciliation of an administrative complaint of religious discrimination constitutes "reasonble accommodation" under 42 U.S.C. § 2000e(j) (App. A. at 12). The court's determination that it did not is erroneous and should be reviewed by this Court for several reasons. First, it creates a strict liability standard for employers unintended by Congress and undermines the intent and effectiveness of Title VII's conciliation requirement. This places employers in an unworkable situation, compelling them to offer employment to any and all applicants with religious practices which conflict with the requirements of the job. Further, the court's holding eliminates the employee's duty, established by the circuit courts, to participate meaningfully in the conciliation efforts of state and federal administrative agencies. The effect of this is to render the con-

ciliation process futile in religious discrimination cases and compel judicial consideration of every refusal to hire case brought on a theory of religious discrimination. Finally, the court of appeals' holding that the employer cannot prevail on a theory of undue hardship without proving the impossibility of accommodation is incorrect as a matter of law and is driven by the court's initial erroneous conclusion that no reasonable accommodation can be made after an initial refusal to hire.

These questions are of great significance to all employers in the country who employ more than twenty people and thus are covered by Title VII's provisions. The Tenth Circuit Court of Appeals is alone in ruling on the question of when an employer's ability to cure a good faith decision not to offer employment expires. Adoption of the rule promulgated in this decision will result in automatic and irrevocable liability for employers commencing at the moment the decision not to hire is made.

II. THIS CASE RAISES A SIGNIFICANT ISSUE OF FIRST IMPRESSION CONCERNING THE MEANING AND SCOPE OF THE REASONABLE ACCOMMODATION REQUIREMENT OF TITLE VII.

A. The Court's Construction of the Reasonable Accommodation Requirement Creates a Strict Liability Standard for Employers Unintended by Congress.

The court's construction of the reasonable accommodation requirement creates a *per se* liability for employers in religious discrimination cases which is inconsistent with Congressional intent and case law. The test for evaluation of religious discrimination cases is set forth in the statute at 42 U.S.C. § 2000e(j): it is a violation of Title VII to refuse to employ an individual on the basis of religious observance or practice "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship

on the conduct of the employer's business." This Court has interpreted the accommodation requirement to make it unlawful "for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

The court of appeals found that when Nobel-Sysco failed to hire Toledo without attempting first to accommodate him, ". . . assuming it could have done so without undue hardship, it committed an illegal act." 892 F.2d at 1488. "The settlement offer made in response to the administrative charge could not undo the completed act." *Id.* The court did not actually "assume" that the accommodation in this case could be made without undue hardship; its later discussion of undue hardship makes it clear that an employer cannot ever succeed on the defense that no reasonable accommodation is possible without having first attempted the accommodation. In practice, this holding means that a good-faith refusal to hire an applicant with a religious practice which conflicts with the job requirements cannot be cured through the conciliation process by a subsequent offer of employment with back pay.

This places an impossible burden on employers. The employer who declines to offer employment to an individual based on legitimate concerns that the person's religious practice (such as in this case, the use of an hallucinogenic drug) may pose a health and safety hazard, will be penalized automatically if the applicant files a complaint of religious discrimination because no accommodation was attempted prior to the decision not to hire. Under the appellate court's construction, the employer cannot escape liability if it erred in its initial determination, and the employee applicant need only go through the exercise of filing a complaint to prevail on a complaint of discrimination.

The importance of this holding to employers and the public is substantial: it requires an employer to accommodate all prospective employees with conflicting religious practices at the outset, solely to position itself to defend against a discrimination claim, without regard to whether such accommodation is reasonable or whether, as in this case, employment may present a safety risk to the general public. In order to avoid the irrevocable liability of an erroneous decision not to hire, employers will have to anticipate the religious practices of prospective employees and establish *a priori* accommodation plans so that they can be prepared to offer employment with accommodation, notwithstanding whether such accommodation is reasonable or practicable under the circumstances. Only by doing so can employers escape the strict liability created by this ruling.

The district court found that if Toledo drove a truck on the morning after a peyote ceremony, he would have presented a significant safety hazard. 651 F. Supp. at 492. The court also found that Toledo attended ceremonies on Friday or Saturday night, and that the job for which he applied required him to drive Saturdays and occasionally on Sundays. 651 F. Supp. at 485. Application of these findings to the facts of this case demonstrate the unworkability of the standard established by the court. Toledo took the position from the outset that no restriction on his peyote usage was acceptable; therefore, the employer would have no choice but to offer Toledo employment initially, propose the very accommodations which Toledo rejected in this case, and when he refused the accommodation proposals, either allow him to drive unregulated or fire him. Going through these steps is the only way Nobel-Sysco could have asserted the defense of inability to accommodate in this case, and it will be the only way any employer can escape liability under similar circumstances, unless this Court grants certiorari and reverses the court of appeals in this case.

The court of appeals' concern that a contrary ruling would mean that employers' conduct will be virtually unregulated when conflicts over religious practices first arise is unfounded. 892 F.2d at 1488. Title VII's remedies operate to cure an erroneous judgment on the part of the employer and make an individual injured thereby whole through awards of back pay, front pay, reinstatement and attorneys' fees. These remedies serve to check employers' conduct prospectively because an employer would not knowingly expose itself to awards of back and front pay, possible attorneys' fees, as well as its own fees and costs necessarily incurred in responding to a Title VII administrative complaint or lawsuit.

It is incorrect that, in the absence of immediate liability, employers can and will discriminate with impunity knowing they can later absolve themselves, as if the putative absolution was not economically and socially injurious to the employer. As this Court pointed out in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the primary objective of Title VII "was a prophylactic one: 'It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" 422 U.S. at 417 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). Moreover, in the same case, this Court recognized that "[i]t is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" 422 U.S. at 417-18 (quoting *United States v. N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)). The sanctions in Title VII were thought by Congress to be sufficient deterrent to prospective discrimination, and that determination is undermined by the court of appeals' decision in this case.

Essentially, the court of appeals' opinion falls directly into the trap of defining "reasonable accommodation" as the solution proposed by the employee, which was squarely rejected by this Court in *Ansonia Board of Education v. Philbrook*, 107 S.Ct. 367 (1986). In that case, this Court rejected the lower court's conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal. In doing so, this Court stated:

> Under the approach articulated by the Court of Appeals, however, the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict. This approach, we think, conflicts with both the language of the statute and the views that led to its enactment.

107 S.Ct. at 372. In defining the scope of the employer's duty to accommodate, this Court explained: "In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs." 107 S.Ct. at 373. By effectively requiring the employer to offer reasonable accommodation on terms defined by the employee, the court below completely disregarded this Court's rejection of that approach in *Philbrook*.

The court of appeals' ruling altogether eliminates the reasonableness inquiry from the refusal to hire case because it compels a finding of discrimination in cases such as this where the employer concludes that no reasonable accommodation is possible, considering the requirements of the job and the religious practice involved. If, for example, Toledo had been qualified for and applied for a position as an air traffic controller, and assuming the job required him to be at work six days a week and be on call on Sundays; and if, as in this case, he took the position that no restriction on his peyote usage was acceptable, any initial determination the employer made as to

the reasonableness of proposed accommodations would not later be subject to judicial review because a court would be compelled by this decision to find that the initial refusal to hire was itself discriminatory. Because it eliminates the reasonable accommodation inquiry from cases such as this, the court of appeals' decision should be reviewed by this Court.

B. The Court's Ruling Effectively Extinguishes the Plaintiff's Duty to Cooperate with Attempts at Reasonable Accommodation.

The court of appeals' ruling also undermines the policy considerations behind the conciliation process in Title VII's scheme of administrative remedy. Title VII's remedial scheme, which was designed to promote administrative resolution of employment discrimination complaints, is undercut by the court's holding that an unsuccessful applicant who files a complaint of discrimination need not respond to an employer's conciliation offer. In fact, this case creates an incentive for an employee to refuse to negotiate conciliation offers under these circumstances, because according to the holding in this case, the employer's liability is established by the very act of refusing employment without offering accommodation, and the complainant need only file and wait in order to receive back pay without having to perform any work.

This ruling eliminates the duty of the complainant to cooperate with attempts at reasonable accommodation set forth by the Eighth Circuit in *Chrysler Corporation v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978), and *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145 (5th Cir. 1982). The effect of the court of appeals' ruling is to limit the duty to conciliate only to present, but not prospective employees. If Congress had intended such a distinction, it would have so stated in the statute. Unless reversed by this Court, the effect of the decision in this case will be to

make the administrative resolution process a pro forma exercise in religious discrimination cases, and increase rather than reduce the number of such cases requiring judicial consideration.

III. THE COURT'S RULING CONFLICTS SQUARELY WITH THIS COURT'S VIEW EXPRESSED IN *TRANS WORLD AIRWAYS v. HARDISON* REGARDING THE BURDEN OF PROOF OF UNDUE HARDSHIP IN TITLE VII CASES.

In addition to having improperly created a strict liability standard for the reasonable accommodation inquiry, the appellate court's rulings effectively eliminates the undue hardship defense by applying the incorrect legal standard to that inquiry. It erroneously raised the employer's burden to one of having to prove the impossibility of the accommodation in order to prove undue hardship. In so doing, it collapsed the two inquiries of reasonable accommodation and undue hardship into one. The decision in this case would leave employers no recourse other than going to federal court to seek declaratory relief on the question of whether an accommodation created an undue hardship before making any employment decision. This cannot be the scheme envisioned by Congress when it drafted Title VII.

A. The Standard Established By The Court of Appeals Is Erroneous As a Matter of Law.

The court of appeals' standard for proof of undue hardship must be examined because it places an impossible burden on employers. In holding that the employer in this case failed to meet the "undue hardship" requirement of the religious discrimination provision of Title VII, the court of appeals established an impossibility standard which exceeds the standard set in the statute. "Nobel failed to show that accommodation of Toledo's practice without undue hardship was impossible. Its refusal to hire him therefore constitutes a violation of Title

VII's prohibition against employment discrimination based religion." 892 F.2d at 1492.

In so holding, both lower courts misapplied the test developed by this Court in *Trans World Airlines, Inc. v. Hardison*, and followed by the other circuits. Under this Court's test, an employer can meet its burden of proving undue hardship of accommodation, by demonstrating that the potential accommodation would create more than a *de minimis* hardship. 432 U.S. at 84. In adopting the lower court's finding that "Nobel failed to show that accommodation of Toledo's practices without undue hardship was impossible," 892 F.2d at 1492, the court of appeals established an "impossibility" standard greatly exceeding the "*de minimis*" standard articulated in *Hardison*.

In *Hardison*, the accommodation proposed by the court of appeals was the same as that proposed by the district court in this case; namely, that another employee be assigned to work on the days Hardison could not work due to his religious observance. 432 U.S. at 84. This Court considered the court of appeals' suggestion that TWA replace Hardison on his shift with other available employees: "Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages. To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* This is precisely the accommodation proposed by both courts in this case, which the district court found would not create more than a *de minimis* cost. However, the district court misapplied the *Hardison* formulation because it calculated only the possible costs of paying another employee to replace Toledo, without considering the additional undue burden on the conduct of the employer's business. As in *Hardison*, requiring another worker to replace Toledo would have called for effective abandonment of the seniority system, an accommodation expressly rejected by this Court in *Hardison*, 432 U.S. at 82.

Such accommodation also ignores *Hardison's* additional finding that requiring the employer to finance an additional day off for the employee and "then to choose the employee who will enjoy it on the basis of his religious beliefs," 432 U.S. at 84, creates an unacceptable situation where "the privilege of having Saturdays off would be allocated according to religious beliefs." 432 U.S. at 85. This Court found that alternative to be a clear violation of the non-discrimination language of Title VII in *Hardison. Id.*

Moreover, the lower courts' speculation about the degree of hardship posed by accommodation in this case is somewhat disingenuous in light of the record. The district court found that the job for which Mr. Toledo applied required him to be available to work seven days a week, 651 F. Supp. at 485; that Toledo took doses in sufficient amounts to produce hallucinations, 651 F. Supp. at 487; that reactivation experiences (psychological sensations reliving what was sensed when under the influence of peyote) can occur as long as thirty-six hours after ingestion, *id.*; that a peyote user should not drive a truck for about twenty-four hours after ingesting peyote in the amounts Toledo ingested it, *id.*; and that Toledo's position was, and still is, that he should be hired as a truck driver with no restriction on his use of peyote in religious ceremonies. 651 F. Supp. at 486. Nonetheless, the district court found that the employer failed to show that it would have suffered more than a *de minimis* burden by employing Toledo. It is syllogistic to hold that the employer in this case could not make a showing of undue hardship because it could have easily accommodated Toledo's religious practice by requiring him to take a day off, when the record is clear that Toledo would not accept any such restriction and that, unrestricted, Toledo posed a risk of driving under the influence of the drug.

Moreover, although the court of appeals purported to adopt the disjunctive test of *Penscar v. Joint District*

Number 28, 735 F.2d 388, 390 (10th Cir. 1984), that Title VII requires reasonable accommodation *or* a showing that reasonable accommodation would be an undue hardship on the employer, in this case, it actually did no such thing. In fact, the court made the undue hardship inquiry dependent on a showing that reasonable accommodation was impossible, effectively eliminating any defense of prospective undue hardship. It collapsed these two separate inquiries into one by requiring an employer to prove the impossibility of the accommodation in order to establish undue hardship. By collapsing these two inquiries into the single inquiry of whether any accommodation was possible, the lower court effectively eliminated the *de minimis* undue hardship test developed by this Court in *Hardison*.

The court's interpretation also is in conflict with other circuits which have found that undue hardship may be shown without the employer having made an accommodation offer. *See, e.g., Nottelson v. Smith Steel Works*, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 340 (6th Cir. 1978). Although not all of these cases resulted in vindication for the employer, they all hold that the defendant may raise the defense of undue hardship even if no accommodation has been attempted. However, the Sixth and Ninth Circuits have placed the burden on an employer "to prove that [he] made good faith efforts to accommodate [plaintiff's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship." *Anderson*, 589 F.2d at 401; *see also McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978). As the court noted in *Edwards v. School Board of the City of Norton, Virginia*, 483 F. Supp. 620 (W.D. Va. 1980), *vacated in part on other grounds*, 658 F.2d

951 (4th Cir. 1981), these holdings are contrary to the plain language of the statute:

> The statute only speaks in terms of "undue hardship" and never requires an active burden of the employer to make accommodation efforts when he feels an undue hardship is present. Similarly, the *ratio decidendi* of *Hardison* does not require a finding that the employer take active steps to accommodate in a case when any accommodation may constitute an undue hardship.

483 F. Supp. at 626.

Finally, if the lower courts had correctly applied the applicable standards set out by this Court in *Philbrook* and *Hardison*, they could only have concluded that Nobel-Sysco sustained its burden of proving undue hardship.

Because the appellate court's construction of undue hardship in this case is in conflict with rulings of this Court and the other circuit courts, it should be reviewed.

B. Compliance With the New Regulatory Provisions Concerning Drug Testing for Motor Vehicle Carriers Creates Undue Hardship *for* Employers.

On November 21, 1988 the Department of Transportation published new regulations in the Federal Register requiring commercial motor carriers to have an anti-drug program which includes drug testing of drivers for controlled substances. 53 Fed. Reg. 47134 (November 21, 1988). The testing must be conducted prior to employment, periodically, based on reasonable cause, randomly and following an accident. Post-accident testing is also required. The regulations state that their purpose is: "[t]o prohibit a driver from driving while that driver has a prohibited drug in his or her system or if that driver has used drugs as evidenced by drug tests showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug free motor carrier work force. . ." *Id.* The regulatory language is clear that an

employer who knowingly hires someone who uses a drug such as peyote cannot under any circumstances, comply with the new regulations.

> Under this rule, a driver may not use controlled substances on or off duty. . . . If controlled substance use is detected, an individual is unqualified to drive a commercial motor vehicle involved in interstate commerce. A driver could not be hired or used if he/she has a confirmed positive drug test as a result of a pre-employment, periodic, reasonable cause, post-accident or random test. In all cases of a positive test, the driver is medically unqualified until such time as the driver no longer uses controlled substances, tests negative for controlled substances, and is medically recertified.

Id. at Fed. Reg. 47135.

These new regulations conflict squarely with the compelled attempt at accommodation required by the ruling of the court of appeals in this case, and are illustrative of the hazards of collapsing the reasonable accommodation inquiry into the undue hardship inquiry. If the appellate court's ruling stands, then Nobel-Sysco or any other motor carrier covered by the regulations would be faced with irreconcilable requirements. On the one hand, the employer could not, under the court of appeals' ruling, refuse at the outset to hire an individual who uses peyote. The employer would have to attempt to accommodate the religious practice or would be held liable for its failure to do so. At the same time, hiring a known user of peyote would automatically violate the new requirement prohibiting any use of drugs by commercial motor vehicle drivers and requiring employers to conduct and report the results of pre-employment and random post-employment drug testing of drivers.

The new regulations are expressly intended to address mounting concerns, such as those Nobel-Sysco had in this case, about the effects of the use of drugs on highway

safety, notwithstanding the legality or illegality of the substance use itself. In response to growing national concerns about highway safety in light of the increasing use of drugs, the Federal Highway Administration has promulgated these broader rules which would prohibit a commercial motor vehicle carrier from employing as a driver of anyone who used any drug, including peyote, at any time. Because of this prospective conflict with the enhanced Department of Transportation regulations, the court of appeals' ruling should be reviewed.

CONCLUSION

For the foregoing reasons, Petitioner Nobel-Sysco Foods Services Co. respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 86-1853, 86-1871

WILBUR TOLEDO,
Plaintiff-Appellant/Cross-Appellee,

v.

NOBEL-SYSCO, INC.,
Defendant-Appellee/Cross-Appellant.

Dec. 29, 1989

Stephen T. LeCuyer of Mettler & LeCuyer, Shiprock, N.M., for plaintiff-appellant/cross-appellee.

Peter J. Adang (Jeffrey Twersky and Eleanor K. Bratton, with him on the brief) of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, N.M., for defendant-appellee/cross-appellant.

Before LOGAN and SEYMOUR, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Wilbur Toledo brought suit under 42 U.S.C. § 1981 (1982) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982), charging that Nobel-Sysco, Inc. discriminated on the basis of religion, race, and national origin when it refused to hire him as a truck driver due to his religious use of peyote. The dis-

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* The Honorable Aldon J. Anderson, Senior United States District Judge, District of Utah, sitting by designation.

trict court dismissed Toledo's race and national origin claims on Nobel's motion for summary judgment and, after a bench trial, also dismissed his religious discrimination claim. The court held that although Nobel's failure to hire Toledo was religious discrimination, offers Nobel made during subsequent administrative proceedings constituted reasonable accommodation of Toledo's religious practices and thus cured the discriminatory act. *See Toledo v. Nobel-Sysco, Inc.*, 651 F.Supp. 483 (D.N.M. 1986). We reverse as to the religious discrimination claim because settlement offers made during administrative proceedings do not qualify as "reasonable accommodation" under the religious discrimination provision of Title VII. We affirm the summary dismissal of Toledo's race and national origin discrimination claims.

I.

FACTS

A. Toledo's Employment Application

In March 1984, Toledo applied for a position as a truck driver for Nobel-Sysco, Inc., Nobel is a restaurant supply corporation that distributes food, equipment, and other supplies to customers in Wyoming, Colorado, Arizona, and New Mexico. Toledo applied for a job as a delivery driver domiciled in Farmington, New Mexico, where he lived. Had Toledo been hired, he would have made deliveries to customers in northern New Mexico and southern Colorado, a responsibility which included considerable driving over mountain roads. He also would have been required to work Monday through Saturday, and to be available for occasional Sunday deliveries. He would have worked without day-to-day supervision from Nobel, whose nearest office is in Albuquerque.

Nobel responded to Toledo's application by inviting him to interview at its Albuquerque office. Nobel's office

manager, Rodney Plagmann, conducted the interview. After the interview, Plagmann told Toledo he had the necessary experience for the job and would be hired if he passed four tests routinely given to all of Nobel's driver applicants. One of these tests was a polygraph to determine an applicant's truthfulness in responding to questions about past illegal drug use. It was a Nobel policy not to hire applicants who had used illegal drugs in the two years preceding their job application. This policy was stated in both the newspaper advertisement to which Toledo had responded and in information sent to Toledo before his interview. After being told of the polygraph requirement, Toledo informed Plagmann that he was a member of the Native American Church, and had used peyote as part of church ceremonies. Toledo described the purpose of the ceremonies, and indicated he had used peyote twice in the previous six months.

Plagmann did not attempt at that time to obtain more specific information regarding Toledo's use of peyote, but he did say that Nobel probably could not hire Toledo. After the interview Plagmann sought advice from James Etherton, Nobel's director of personnel. Etherton in turn called Nobel's labor relations advisor, Jack Moore of Mountain States Employers Council, and related the details of Toledo's interview. Moore told Etherton that although religious use of peyote was legal, hiring a known user would expose Nobel to potential liability if he were ever involved in an accident while driving for Nobel. Etherton then told Plagmann not to hire Toledo, and Plagmann in turn informed Toledo that Nobel could not hire him because of his use of peyote. Neither Etherton nor Plagmann discussed or attempted accommodation of Toledo's religious practice at that time.

B. The Native American Church and Use of Peyote

Toledo has been a member of the Native American Church since 1983. The role of peyote in church cere-

monies was well documented at trial, and has been the subject of considerable attention in judicial opinions. *See, e.g., Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193 (5th Cir. 1984); *Native American Church of New York v. United States*, 468 F.Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988), *cert. granted*, —— U.S. ——, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989); *People v. Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964). Our discussion of church ceremonies reflects Toledo's description at trial of ceremonies in which he took part, and the trial court's findings based on those descriptions.

Peyote is a small spineless cactus that contains quantities of the hallucinogen mescaline. Native American religious use of peyote was first noticed by Spanish explorers in the 1600's, and efforts to prohibit it date from the same century. Peyote use is the central and most sacred practice of the Native American Church. Its believers consider peyote to be not only a healer, a teacher, and a way of communicating with God, but also a deity itself. The Native American Church is an incorporated religion which combines elements of Christianity with traditional Native American beliefs and the use of peyote.

Peyote ceremonies are held at the request of any member for healing purposes or special occasions. Although the ceremonies may be conducted on any night of the week, they are generally held on Friday or Saturday night. The ceremonies that Toledo attends are conducted by a "Road Man," and take place in a hogan or tepee. A ceremony begins in the late evening, and passes through a series of rituals and prayers, culminating in the ingestion of peyote around midnight. The peyote is prepared by floating "buttons," or small slices, of the cactus in water. It is served in cups which are passed among the participants who both drink the water and chew and swallow the pieces of peyote. Toledo testified that the

cups are always passed once, and often twice. He usually only drinks on the first pass, but occasionally drinks on the second. The ceremony continues until dawn. Toledo stays awake until four or five in the afternoon after a ceremony, and then sleeps until the next morning.

Toledo testified that he normally feels the effects of peyote only for approximately four hours after ingesting it. Experts testified for both sides, and presented considerable scientific descriptions of the effects of peyote. The trial court concluded that the doses Toledo takes at the ceremony are from 1.6 to 6.4 milligrams per kilogram of body weight. Both experts agreed that a person should not drive a truck for 24 hours after ingesting more than 1 milligram per kilogram of body weight.

C. Procedural History

Shortly after he was refused the Nobel job, Toledo filed an employment discrimination claim with the New Mexico Human Rights Commission (HRC) charging Nobel with religious discrimination. He subsequently amended his HRC complaint to charge discrimination based on race and national origin as well. In May 1984, Nobel made Toledo the first of the two offers that are the focus of this dispute on appeal. Nobel indicated it would hire Toledo on three conditions: 1) that he take the polygraph test and it show no illegal drug use other than peyote twice a year; 2) that he take a week of regular vacation after each ceremony; and 3) that he drop his HRC complaint if Nobel hired him *or* if he failed the polygraph test or physical examination. Toledo rejected the offer and did not make a counter-offer.

On May 24, HRC found probable cause that religious discrimination had occurred. The parties continued their negotiations, and on July 10 Nobel improved its initial offer. Nobel indicated that if Toledo would give one week's notice before taking part in a ceremony, he would be required to take only one day off after each ceremony. Nobel also offered $500 in back pay, but still required

the polygraph test, the physical examination, a limit of two ceremonies a year, and that Toledo drop his claim. Toledo rejected the offer because the back pay amount was insufficient and because he felt the restrictions on his peyote use were unjustified. He also thought that Nobel would use the polgraph test and physical examination as an excuse to disqualify him, thereby getting rid of both him and his discrimination claim. Toledo did not make a counter-offer.

In January 1985, the EEOC issued Toledo a right to sue notice. Toledo filed this suit, charging religious discrimination in violation of Title VII, and race and national origin discrimination in violation of Title VII and 42 U.S.C. § 1981. The district court granted Nobel summary judgment on Toledo's race and national origin claims. After a bench trial, the court also held for Nobel on the issue of religious discrimination. The court determined that although Toledo had made out a prima facie case of religious discrimination, the July 10 offer made in the course of the HRC proceedings constituted reasonable accommodation of Toledo's religious practices. The court also refused to award Toledo back pay for the four months between the discriminatory act and the accommodation offer because Toledo had not proven the appropriate amount at trial. Finally, the court awarded Nobel costs.

Toledo appeals the court's holding that the settlement offers absolved Nobel of liability and ended its backpay obligations, the award of costs, and the dismissal of his race and national origin claims. Nobel cross-appeals the court's holding that Nobel could have accomodated Toledo without undue hardship.

II.

LIABILITY

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to dis-

charge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2. Religion is defined by the Act as follows:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

42 U.S.C. § 2000e(j) (1982). As the Supreme Court has noted, "[t]he reasonable accomodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n. 1, 107 S.Ct. 367, 369 n. 1, 93 L.Ed.2d 305 (1986).

> "The Supreme Court has held that the intent and effect of this definition of 'religion' is to make it a violation of § 2000e-2(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practice of employees and prospective employees."

Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390 (10th Cir.1984) (citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 97 S.Ct. 2264, 2271, 53 L.Ed.2d 113 (1977)).

Although the Supreme Court has never ruled on the issue, lower courts have implemented a two-step procedure for evaluating claims and allocating burdens of proof under these provisions. First, the plaintiff has the burden of establishing a prima facie case.

> "A plaintiff . . . makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was [not

hired] for failure to comply with the conflicting employment requirement."

Turpen v. Missouri-Kansas-Texas R.R., 736 F.2d 1022, 1026 (5th Cir.1984); *see also Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir.), *cert. denied*, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir.1986). Once a plaintiff has made out a prima facie case, "the burden shifts to the employer to show that it was unable reasonably to accommodate the plaintiff's religious needs without undue hardship." *Turpen*, 736 F.2d at 1026; *see also Pyro Mining*, 827 F.2d at 1085; *Protos*, 797 F.2d at 134; *Proctor*, 795 F.2d at 1475.

The district court in this case found that Toledo met his burden of establishing a prima facie case, and Nobel does not contest this finding on appeal. It was undisputed at trial that the Native American Church is a bona fide religion, Toledo is a member of the Church, Toledo's beliefs in its teachings are sincere, Toledo uses peyote only as part of church ceremonies, and Nobel refused to hire Toledo because of his peyote use. *See Toledo*, 651 F.Supp. at 488.

The dispute at trial and in this appeal centers on the district court's findings with respect to reasonable accommodation and undue hardship. The court held that Nobel could rebut the prima facie case by showing either actual efforts at reasonable accommodation or that it could not accommodate Toledo's practices without undue hardship. The court rejected Nobel's argument that it could not have accommodated Toledo's peyote use without undue hardship, but held that the July 10 offer constituted an attempt at reasonable accommodation.

Nobel argues on appeal that the district court erred in holding that it could have accommodated Toledo's religious

practices without undue hardship, but was correct in finding that the July 10 offer was an effort at reasonable accommodation. Nobel also argues that by adopting an intractable bargaining position, Toledo breached his duty to cooperate with Nobel's accommodation efforts. Toledo argues that the July offer was a settlement offer, and not an accommodation offer. He also claims that although the court was correct in holding that Nobel could have accommodated his practices without undue hardship, the court should not have reached this issue because Nobel failed to prove any effort at accommodation.

We address in turn whether either settlement offer qualifies as a reasonable accommodation under 42 U.S.C. § 2000e(j), whether Toledo breached any duty to cooperate by refusing these offers, and, finally, whether the district court was correct in addressing the issue of undue hardship and finding in Toledo's favor.

A. Accommodation

Whether a settlement offer made in the context of an administrative proceeding on a claim of religious discrimination qualifies as reasonable accommodation under section 2000e(j) appears to be a question of first impression. Rather than relying on precedent, therefore, the parties focus their arguments on the policies behind this provision of Title VII. Nobel correctly points out that Title VII strongly encourages cooperative settlements as the primary means for resolving claims of discrimination. Nobel argues that including settlement offers made in the course of administrative proceedings as efforts at reasonable accommodation will encourage the making of such offers, thus furthering the important statutory policy favoring voluntary reconciliation.[1] Toledo contends in re-

[1] The parties do not address the impact of 42 U.S.C. § 2000e-5(b) on this issue. That provision states in pertinent part that nothing said or done in the course of administrative proceedings may be "used as evidence in a subsequent proceeding without the written

sponse that this approach would encourage employers to adopt a wait-and-see attitude towards employees with problematic religious practices. He suggests that when an employee or applicant presents an employer with a religious practice that conflicts with an employment requirement, under Nobel's approach the employer would have every incentive to discriminate against the employee, knowing that if the employee files a complaint it can absolve itself of liability by attempting accommodation at that time.

We believe that Toledo's position represents the better view. It finds initial support in the language and structure of the statute, which makes illegal any adverse employment action grounded in discrimination on the basis of religion. 42 U.S.C. § 2000e-2. Religion is defined as any practice, belief, or observance which an employer can reasonably accommodate without undue hardship. 42 U.S.C. § 2000e(j). These provisions of the statute together imply that acting to the detriment of an applicant or employee because of his religion *before* attempting accommodations is illegal. This reading comports with the Supreme Court's conclusion that the effect of the accommodation requirement "was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airways*, 432 U.S. at 74, 97 S.Ct. at 2271.

When Nobel rejected Toledo based solely on his religious practices without an attempt to accommodate him, assuming it could have done so without undue hardship,

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consent of the parties concerned." Courts discussing this disclosure provision have concluded that it promotes voluntary conciliation, undercutting Nobel's argument that the disclosure of such offers in litigation furthers voluntary settlement. *See, e.g., Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 127 (5th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988).

it committed an illegal act. The settlement offer made in response to the administrative charge could not undo the completed act.[2] Indeed, the effect in the Title VII context of offers of employment is well defined and narrow. The Supreme Court has held that after an employee brings a Title VII claim, an offer of employment may toll backpay liability if the offer is not conditioned on dropping the discrimination charges. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 232-34 & n. 18, 102 S.Ct. 3057, 3065-66 & n. 18, 73 L.Ed.2d 721 (1982). Nobel's offer to Toledo was conditioned on Toledo dropping the charges, as well as his passing a number of tests. We see no reason to give this offer the new power of "curing the discriminatory act," when under *Ford* it would not even toll Nobel's liability for backpay.[3]

In addition, Toledo's policy arguments are more persuasive. Under the rule advocated by Nobel, an employer could absolve itself from liability for religious discrimination after it had disadvantaged an employee. When conflicts with religious practices first arise, an employer's conduct and the manner in which it deals with such conflicts would be virtually unregulated. Title VII would provide employees no protection until after the fact, an

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[2] The approach accords with that taken by the court in *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448 (W.D. Mich. 1986), *appeal dismissed*, 815 F.2d 76 (6th Cir. 1987). The employer there suspended an employee for his religiously-motivated refusal to work Sundays, and only then considered shift-trading arrangements that might accommodate the employee's religious practices. The court refused to consider these efforts because the "defendant failed to engage in efforts to accommodate reasonably plaintiff's religious belief against working on Sundays until after plaintiff had suffered adversely for adhering to such relief." *Id.* at 1454.

[3] Toledo argues that because the offers constituted settlement offers, they should have been inadmissable under Federal Rule of Evidence 408. Given our reversal on other grounds, we need not address this issue.

important consideration given the impact a suspension, termination, or rejection may have on an individual's life. We conclude that the trial court erred in considering Nobel's settlement offers as reasonable accommodation which cured Nobel's illegal discriminatory act.

B. Toledo's Duty to Cooperate

Nobel correctly points out that an employee or applicant has a duty to cooperate with an employer's efforts to accommodate his religious practices. The Supreme Court has recently endorsed this idea:

> "To the extent it provides any indication of congressional intent, . . . we think that the [legislative] history [of section 2000e(j)] supports our conclusion. Senator Randolph, the sponsor of the amendment that became [section 2000e(j)], expressed his hope that accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment.' 118 Cong.Rec. 706 (1972). Consistent with these goals, courts have noted that 'bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.' "

Ansonia Bd. of Educ., 479 U.S. at 69, 107 S.Ct. at 372 (quoting *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (5th Cir.1982)). Nobel argues that Toledo breached this duty by rejecting its offers and, without offering a counter-proposal, taking the position that the proposed limitations on his religious practices were unacceptable. This breach, the argument continues, should absolve Nobel from any liability under Title VII.

We disagree. In *Ansonia Bd. of Educ.* the employee's duty to cooperate was triggered by the employer's initial efforts at accommodation. Here, to the contrary, Nobel did not attempt to accommodate Toledo's beliefs before it refused to hire him. "[T]he statutory burden to ac-

commodate rests with the employer," *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir.1982), and the employee's "duty to make a good faith attempt to satisfy his needs through means offered by the employer," is irrelevant until the employer satisfies its initial obligation under the statute. *Id.; see also Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978) ("The burden was upon the [employer], not [the employee], to undertake initial steps toward accommodation. [The employer] cannot excuse [its] failure to accommodate by pointing to deficiencies . . . in [the employee's] suggested accommodation."), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979). Because the accommodation offer came after the initial unlawful refusal to hire, we conclude that Toledo did not breach his duty to cooperate with Nobel in reaching a reasonable accommodation.

C. Undue Hardship

The court below held that Nobel could accommodate Toledo's religious use of peyote without undue hardship. Toledo argues that any claim of undue hardship should not be considered by a court when the employer has not met its burden of coming forward with evidence of attempts at reasonable accommodation.

In support of this position Toledo cites language from a decision of this court and from decisions of a number of other courts of appeals.[4] For example, in *Williams v.*

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[4] Language from two Ninth Circuit opinions arguably supports Toledo's position. *See Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978) ("the burden was thereafter upon [the employer] and the Union to prove that they made good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship."), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978) ("Once the employer has made more than

Southern Union Gas Co., 529 F.2d 483, 489 (10th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976), we stated that the employer "had a duty to at least try to accommodate [the plaintiff's] religious practices." Toledo acknowledges, however, that one could infer from language in another of our cases that an employer may show reasonable accommodation *or* undue hardship. *See Pinsker*, 735 F.2d at 390 ("Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer.")

We are not convinced that these two quotations are inconsistent as a practical matter, because neither was dispositive of any issue in the case. Both cases affirmed lower court holdings for employers based on findings of reasonable accommodation and thus were not concerned with the proper way to deal with cases involving no attempt at accommodation. Because we can find no indication in either opinion that the panel intended to resolve this issue, we turn to the merits.

Nobel's position is in line with that taken explicitly by the Sixth Circuit:

> "[I]t is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations, and we must determine whether the [employer] has made such showing in this case."

Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir.1975); *see also Pyro Mining Co.*, 827

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a negligible effort to accommodate the employee and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute 'undue hardship.'") (citation omitted), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979). In both of these cases, however, the court went on to address and reject the claim that any accommodation would constitute undue hardship as a matter of law.

F.2d at 1086. We believe this is the more reasonable approach, for it is certainly conceivable that particular jobs may be completely incompatible with particular religious practices. It would be unfair to require employers faced with such irreconciliable conflicts to attempt futilely to resolve them. Employers faced with such conflicts should be able to meet their burden by showing that no accommodation is possible.

Although conceivable, such situations will also be rare. We therefore will be "skeptical of hypothetical hardships." *Draper*, 527 F.2d at 520. "The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." *Id.* Indeed, deciding the issue of undue hardship without some background of attempted or proposed accommodation is best resolved by examining the specific hardships imposed by specific accommodation proposals:

> "With other courts, we recognize that the determination 'whether a particular accommodation works an undue hardship on either an employer or union must be made by considering "the particular factual context of each case." ' "

Protos, 797 F.2d at 134 (*quoting Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981)).

Accordingly, we hold that an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship. Absent this showing, failure to attempt some reasonable accommodation would breach the employer's duty to initiate accomodation of religious practices.

On appeal, Nobel asserts three arguments supporting the claim that no accommodation is possible in this case.

First, it claims that hiring an active member of the Native American Church would place it in violation of Federal Department of Transportation (DOT) regulations regarding drug use by truck drivers. Second, it claims that any use of peyote is illegal, and that hiring a user of an illegal drug would violate its own policies and its truck lease agreement. Finally, it claims that knowingly hiring a peyote user would expose it to unacceptable liability risks. We address each argument in turn.

Nobel claims here, as it did at trial, that DOT regulations made hiring Toledo illegal. The relevant regulation in effect at the time of Toledo's application stated:

> "(a) No person shall operate, or be in physical control of, a motor vehicle if he possesses, is under the influence of, or is using, any of the following substances:
>
> (1) A narcotic drug or any derivative thereof;
>
> (2) An amphetamine or any formulation thereof (including, but not limited to, 'pep pills' and 'bennies');
>
> (3) Any other substance, to a degree which renders him incapable of safely operating a motor vehicle."

49 C.F.R. § 392.4 (1983).

The district court correctly noted that although peyote is neither a narcotic nor an amphetamine, it could render a driver "incapable of safely operating a motor vehicle" and thus falls under subsection (3) of the regulation. The court also correctly "interpret[ed] the regulation to prohibit possession, driving under the influence of, or use (consumption) of peyote while operating or physically controlling a truck. It does not prohibit use or possession while off duty." *Toledo*, 651 F.Supp. at 489. The court found that Toledo never used peyote outside of religious ceremonies, and that Nobel could have

ensured compliance with the regulation by requiring Toledo to take a day off after each ceremony. This finding of fact is not clearly erroneous, and we do not disturb it on appeal. *See Pyro Mining*, 827 F.2d at 1089; *Protos*, 797 F.2d at 134-35; *Turpen*, 736 F.2d at 1026; *Williams*, 529 F.2d at 489.

The district court's reasoning with respect to the amended version of the regulation, which took effect on December 5, 1984, is similarly correct. The amended version reads: "(a) No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances: (1) any Schedule I drug or substance identified in Appendix D to this subchapter. . . ." 49 C.F.R. § 392.4(1) (1987). Although peyote is included as a Schedule I substance, the new regulation still prohibits only on-duty conduct. The same accommodation would keep Nobel and Toledo in compliance and allow Toledo to continue his religious practices.

Nobel argues next that peyote is an illegal drug, and that hiring a user of an illegal drug would violate its own policies and its truck lease agreement with Ryder Trucks. The district court rejected this argument by noting that although peyote is a Schedule I illegal drug under the Controlled Substance Act of 1970, 21 U.S.C. § 812(c) Schedule 1(c)(12) (1982), religious use of peyote by members of the Native American Church has been made legal by regulation. *See* 21 C.F.R. § 1807.81 (1988) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church. . . ."); *see generally Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660, 108 S.Ct. 1444, 1451 n. 15, 99 L.Ed.2d 753 (1988); *Peyote Way Church of God*, 742 F.2d at 197-98; *Native American Church of New York*, 468 F.Supp. at 1248. Bona fide religious use of peyote is also explicitly made legal by statute in New Mexico and Colorado, the two states in which Toledo

would have driven. *See* N.M.Stat.Ann. § 30-31-6(D) (1987); Colo.Rev.Stat. § 12-22-317(3) (1985).

The district court disposed of Nobel's argument as follows:

> "Nobel's lease with Ryder, from whom it leased all its trucks, provided that Ryder could remove any driver, cancel its lease or cancel its insurance if any driver used drugs or operated trucks under the influence of drugs which impair the driver's ability to operate the truck. The Ryder Safety Manual also prohibited 'drug abuse'. As indicated above, Toledo's use of peyote was not an illegal use, so did not violate Nobel policy. By requiring Toledo to take a day off after each use of peyote, Nobel would have been complying with the Ryder lease terms on use or being under the influence of drugs while on the job. Toledo's religious use was not drug abuse. Therefore, neither Nobel nor Ryder policies prevented Nobel from hiring Toledo with the reasonable restriction of requiring Toledo to take a day off after each use."

Toledo, 651 F.Supp. at 491. The meaning of the federal regulation and New Mexico statutory exemption are evident and undisputed. A review of the record has convinced us that the district court's findings regarding the Ryder lease and Nobel policy are not clearly erroneous.

The only argument left to Nobel, and the one which figures most prominently in its brief, is that the regulatory exemption of peyote promulgated by the Attorney General exceeded the Attorney General's regulatory authority under the statute. Nobel claims that the Attorney General may only employ criteria set out in the 1970 statute in exempting substances from Schedule I, and that the religious exemption is not supported by any of these criteria. Nobel also argues the Attorney General does not have power to make partial exemptions under the statute.

We note initially that considerable legislative history, some cited by the trial court, indicates that when Congress passed the 1970 statute, it did so intending that the exemption contained in the previous statute for peyote use associated with the Native American Church be preserved by regulation. *See Toledo*, 651 F.Supp. at 490; *see also Native American Church of New York*, 468 F.Supp at 1250-51 (discussing legislative history). More importantly, two criteria appear in the statute which would justify the regulatory exemption:

> "In making any finding under subsection (a) of this section or under subsection (b) of section 812 . . ., the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:
>
> "(1) Its actual or relative potential for abuse.
> ". . .
>
> "(4) Its history and current pattern of abuse.
> ". . . ."

21 U.S.C. § 811(c) (1982). Both the lessened potential for abuse in the religious context and the history of religious use of peyote support the exemption. We therefore reject Nobel's argument, and agree with the district court's disposition of this claim of undue hardship.

Nobel's final claim of undue hardship is that hiring a known user of peyote would expose Nobel to the risk of increased tort liability should Toledo cause an accident while in its employ. The district court rejected this argument on two grounds: that Toledo's known peyote use would not expose Nobel to new lawsuits, but only to additional liability in suits that already could be brought against it under the doctrine of *respondeat superior*; and that the legality of peyote and restrictions on Toledo's work after ceremonies would virtually eliminate this risk. *See Toledo*, 651 F.Supp at 491. Nobel responds

that this holding does not adequately consider all the nuances of the tort of negligent entrustment and Nobel's potential exposure to punitive damages.

An accommodation that requires an employer to bear more than a "de minimis" burden imposes undue hardship. *See Trans World Airways*, 432 U.S. at 84, 97 S.Ct. at 2276. Any proffered hardship, however, must be actual; "[a]n employer . . . cannot rely merely on speculation." *Pyro Mining*, 827 F.2d at 1086; *see also Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir.) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships. . . . The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case."), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981).

We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship. As the district court found, accommodating Toledo's practices by requiring him to take a day off after each ceremony would virtually eliminate the risk that the influences of peyote would cause an accident or be a factor in subsequent litigation. This finding in turn depends on the district court's previous factual determinations that the doses of peyote Toledo ingested at ceremonies would have dissipated after a day's rest. *See Toledo*, 651 F.Supp. at 487, 489, 491. These findings are all well supported by the record and are not clearly erroneous.

Nobel failed to show that accommodation of Toledo's practices without undue hardship was impossible. Its refusal to hire him therefore constituted a violation of Title VII's prohibition against employment discrimination based on religion.[5]

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[5] As the discussion in Part IIC on undue hardship indicates, the instant case is clearly distinguishable from *Smith v. Employment*

III.

BACK PAY

The district court reached two distinct conclusions with respect to backpay. First, it held that "[s]ince Toledo turned down the [July 10] offer to be hired, the only possible damages owed to Toledo are four months of back wages reduced by the amount Toledo earned during that time." *Toledo*, 651 F.Supp. at 492. The court thus held that the July 10 offer tolled Nobel's liability for backpay. Second, the court concluded that Toledo failed to prove the appropriate amount of backpay at trial. Toledo questions both of these conclusions.

Div., 307 Or. 68, 763 P.2d 146 (1988), *cert. granted*, —— U.S. ——, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989). In *Smith*, a county employee was discharged from his position as an alcohol abuse counselor for the off-duty religious use of peyote, and was subsequently denied unemployment compensation. Smith contended that the state's denial of benefits impermissibly burdened his right to the free exercise of his religion guaranteed by the First Amendment. The Oregon Supreme Court agreed, holding:

> "We conclude that the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress. We therefore reaffirm our holding that the First Amendment entitles petitioners to unemployment compensation."

Id. 763 P.2d at 148 (footnote omitted). The Supreme Court granted certiorari to consider whether the First Amendment's Free Exercise Clause protects a person who uses peyote for religious purposes from prosecution under a state criminal statute. *See* 57 U.S.L.W. 3593.

In the instant case, no state action is involved and the First Amendment is therefore not implicated. Instead, the issue is whether Nobel's conduct violates Title VII. Moreover, and more importantly for purposes of the specific arguments Nobel raises here, while the religious use of peyote is subject to criminal prosecution in Oregon, it is exempt from prosecution in all jurisdictions with any relevance to this case. *See supra* at 1491.

It is true "that a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for backpay." *Ford Motor Co.*, 458 U.S. at 241, 102 S.Ct. at 3070. Under *Ford*, however, this rule applies only if the offer of employment is not conditioned on dropping the Title VII claim. Id. at 282 n. 18, 102 S.Ct. at 8066 n. 18; *see also Figgs v. Quick Fill Corp.*, 766 F.2d 901, 903 (5th Cir.1985). As we have previously noted, Nobel's offer to Toledo was conditioned on Toledo dropping his claim, as well as his passing a polygraph test and physical examination. Because the offer was not unconditional, the district court erred in concluding that Nobel could potentially be liable for backpay covering only the four-month period before the offer. Moreover, a rejected offer of reinstatement does not end ongoing backpay liability if the claimant's rejection of the offer was reasonable given the form of the offer and the circumstances surrounding it. *See Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir.1986); *see also Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 879 (11th Cir. 1986) (holding that invitation to apply for position is not unconditional offer of employment, and citing cases); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 757 (7th Cir.) (offer to reinstate age discrimination claimant conditioned on claimant passing physical did not toll backpay liability where claimant reasonably believed that employer considered him physically unqualified), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed.2d 680 (1983).

The district court also stated that Toledo failed to establish at trial the "four months of back wages reduced by the amount Toledo earned during that time." *Toledo*, 651 F.Supp. at 492. The relevance of this statement is compromised by our holding that Nobel is liable for backpay past the July 10 settlement offer. In addition, the legal and factual basis for the statement is unclear. Toledo cites to evidence in the record from which both his backpay and interim earnings could be calculated. *See*

rec., vol. 2, at 317; Def. Ex. P, Jt. App. at 124-26. Nobel does not dispute this evidence. Instead, it interprets the district court's statement as indicating that Toledo did not prove the amount of unemployment compensation he received during the four month period. However, Nobel's own exhibit P lists Toledo's unemployment compensation for the period from March 12, 1984, to July 1, 1984, as $2,320.00. Moreover, the amount of unemployment compensation Toledo received is not essential to ascertaining backpay because it is within the district court's discretion whether to discount a backpay award by the amount of unemployment compensation earned by the claimant during the relevant period. *See EEOC v. Sandia Corp.*, 639 F.2d 600, 624-26 (10th Cir.1980).

Accordingly, we must remand for a determination of backpay liability under the proper standards. In assessing the amount of the award to which Toledo is entitled, the court should not consider the July 10 offer as tolling liability. In addition, the court should take into consideration that once a plaintiff has established a violation and presented evidence on damages, "the employer has the burden of showing that the discriminatee did not exercise diligence in mitigating the damages caused by the employer's illegal actions." *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 937 (10th Cir.1979).

IV.

RACE AND NATIONAL ORIGIN DISCRIMINATION

In his complaint, Toledo asserted a claim of race and national origin discrimination under both Title VII and 42 U.S.C. § 1981. Specifically, paragraph 17 of the complaint states:

> "Defendant's refusal to hire plaintiff because of plaintiff's sincere religious use of peyote in connection with the bona fide religious activities of the

> Native American Church constitutes discrimination on the basis of race and national origin, in violation of 42 U.S.C. §§ 1981, 2000e-2(a)."

Rec., vol. I, doc. 1 at 3. The district court granted summary judgment in favor of Nobel on these claims after concluding that Toledo failed to assert facts supporting his claim that Nobel's refusal to hire him was due to his race or national origin.[6]

On appeal of a grant of a summary judgment motion, this court will review the record in the same manner as the district court, and interpret the evidence in the light most favorable to the non-moving party. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265.

To prove his Title VII claim, Toledo had the initial burden to establish, by a preponderance of the evidence, that he is a member of a racial minority, that he was qualified for the position and was rejected, and that after he was rejected Nobel either continued to seek applicants for the position or filled the position with a non-minority employee. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 86 L.Ed.2d 668 (1973). In his complaint, Toledo alleged that Nobel refused to hire him "solely" because of his peyote use. Nowhere in his complaint did he assert any racial animus; nowhere in the summary judgment record did he point to evidence of any racial animus. He did not plead or present evidence that the driver position was filled by a non-

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[6] Toledo has abandoned his claim under 42 U.S.C. § 1981 on appeal, pursuing only his Title VII claim.

minority. Throughout the proceedings he argued that the "no peyote" requirement is a form of discrimination against Native Americans. Without supporting allegations or evidence of racial animus apart from the desire for peyote-free drivers, the district court was correct in granting Nobel summary judgment.[7]

V.

CONCLUSION

We reverse the holding of the district court relieving Nobel of liability for its discriminatory failure to hire Toledo. By failing to accommodate Toledo's religious practices before refusing to hire him, Nobel violated Title VII. The district court also erred in concluding that the July 10 settlement offer tolled Nobel's backpay liability. The case is remanded to the district court for a determination of appropriate remedies. The award of fees to Nobel as prevailing party is accordingly reversed. The district court, on motion of the parties, may revisit the fees issue in light of the disposition of this appeal and any further proceedings below.

REVERSED AND REMANDED.

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[7] Toledo argues on appeal that the trial court erred in failing to employ disparate impact analysis to the Title VII claim. Toledo did not argue this theory to the district court, however, and we therefore will not consider it on appeal. *See Anschutz Land & Cattle Co. v. Union Pac. R.R.*, 820 F.2d 338, 344 n.5 (10th Cir.), *cert. denied*, 484 U.S. 954, 108 S.Ct. 347, 98 L.Ed.2d 373 (1987).

UNITED STATES DISTRICT COURT
D. NEW MEXICO

No. 85-618-M Civ.

WILBUR TOLEDO,

Plaintiff,

v.

NOBEL-SYSCO, INC.,

Defendant.

April 2, 1986

On Motion for Review of Costs

July 2, 1986

Robert B. Turner (co-counsel), Stephen T. Lecuyer (lead counsel), DNA-People's Legal Service, Inc., Shiprock, N.M., for plaintiff.

Jeffrey Twersky, Modrall, Sperling, Roehl, Harris & Sisk, Peter J. Adang, Albuquerque, N.M., for defendant.

MEMORANDUM OPINION AND ORDER

MECHEM, Senior District Judge.

This case came on for bench trial on February 24 and 25, 1986. This opinion constitutes my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

The controversy arises under the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(j) and 2000e-2(a). This court

has jurisdiction over the parties and the subject matter of this action.

This is a case of first impression. The plaintiff, Wilbur Toledo (Toledo), claims religious discrimination in employment by the defendant, Nobel-Sysco, Inc. (Nobel). His claim is based on Nobel's refusal to hire him as a truck driver because of his use of peyote, a hallucinogenic drug, in religious ceremonies of the Native American Church (Church). The question is whether an employer's duty to accommodate an employee's religious practices extends to hiring a truck driver whose religious practices may present a safety hazard to the public.

I. Facts

Toledo is an enrolled member of the Navajo Tribe and lives in or near Farmington, New Mexico. He joined the Church in 1983. Since that time and until the time of trial, Toledo participated in about ten peyote services of the Church. He joined the Church to seek help with an alcohol problem and has not had a drink of alcohol since that time. Toledo ate and drank peyote at these services. Services are not held at regular times, but are held whenever a member needs healing or calls a service for another reason. The services Toledo attended were always held on Friday or Saturday nights.

Nobel is a restaurant supply corporation that distributes food, supplies and equipment to customers in Wyoming, Colorado, New Mexico and parts of Arizona. Nobel's Albuquerque office services customers in New Mexico, Southwestern Colorado and Arizona.

On February 29, 1984 Toledo responded to a newspaper advertisement and applied with Nobel for a truck-driving position known as a "domiciled delivery driver". Nobel was seeking a driver domiciled in Farmington who was an experienced tractor-trailer driver with mountain driving experience. The driver was required to pick up loaded

trailers in Farmington, drive the 18 wheel tractor-trailer on mountainous roads, and deliver the contents to restauarnts in the nearby towns of northern New Mexico and southern Colorado. Other drivers moved the trailers back and forth between Albuquerque and Farmington. The domiciled delivery driver was expected to work six days a week, normally Monday through Saturady, but was to be available to work seven days a week. Nobel occasionally had loads to be delivered out of Farmington on Sundays. Nobel emp'oyed three domiciled delivery drivers in Farmington. There was no supervision of these delivery drivers in Farmington.

Nobel called Toledo to come to Albuquerque for an interview. The interview was conducted by Rodney Plagmann, Nobel's office manager at Nobel offices on March 18, 1984. Plagmann told Toledo that he had the necessary experience for the job and that he would be hired if he passed the four tests that Nobel routinely administers to driver applicants. One was a polygraph test which Nobel administered to determine an applicant's truthfulness regarding use of illegal drugs in the last two years. Plagmann explained Nobel's policy of not hiring drivers who had used illegal drugs in the last two years. This requirement of the job had been stated in the newspayer advertisement and the information sheet sent to Toledo with the application blank.

At the end of the interview, Toledo disclosed to Plagmann that he used peyote in religious ceremonies of the Church. To'edo described the healing purpose of the ceremonies. Toledo stated that he had used peyote about twice in the preceding six months, or "whenever a group of us gets together." Plagmann did not inquire further regarding the frequency, timing or nature of Toledo's use of peyote, and Toledo did not elaborate.

Plagmann considered peyote to be an illegal drug, so while To'edo took the Minnesota Clerical Test, Plagmann called Nobel's personnel director, James Etherton, in

Denver, for advice. Etherton did not know much about the properties of peyote, nor whether religious use of peyote by Church members was legal. Etherton in turn called Mr. Moore of Mountain States Employers Council, Nobel's labor relations adviser. Moore was not a lawyer, but he had lawyers working for him. Moore told Etherton that it was legal for Church members to use peyote in religious ceremonies, but that hiring a known user of peyote would open Nobel to potential liability if the driver was involved in an accident in the course of his employment. Based on this conversation, Etherton recommended to Plagmann that he not hire Toledo because of Toledo's use of peyote. Plagmann told Toledo that Nobel would not hire him because of this use. Plagmann did not administer the polygraph test to determine if Toledo made any nonreligious use of illegal drugs, nor did he offer any accommodation for Toledo's religious practice.

On March 19, 1984, Toledo filed a charge of unlawful discrimination with the New Mexico Human Rights Commission (NMHRC). He stated there he used peyote "only when needed and only at one to two times per year." The NMHRC forwarded the charge to the Equal Employment Opportunity Commission (EEOC), and on April 6, 1984, the EEOC referred the charge back to the NMHRC. On April 10, Toledo signed a request that the EEOC and the NMHRC process his charge in accordance with Title VII and their work-sharing agreement.

In April, the parties or their lawyers exchanged letters indicating that each side was willing to entertain settlement offers. On May 17, 1984, Nobel made Toledo an offer through Patricia Gonzales, a mediator at the NMHRC, at her request. The terms were that Nobel would hire Toledo if he took the polygraph test and it showed no use of illegal drugs other than religious use of peyote twice a year, and if he would take one week of his regular vacation after each of his two uses per year of peyote. If the polygraph test showed use of other drugs

or use of peyote more than twice a year or deception in other areas, Toledo would drop his complaint with the NMHRC. The offer did not include back pay. Toledo verbally rejected the offer, and made no counter offer.

On May 24, 1984, the NMHRC issued a decision that probable cause existed to believe that religious discrimination had occurred.

On July 10, 1984, Nobel amended the offer verbally to another staff member at the NMHRC. The relevant changes were that Toledo would be required to give one week's notice of his use of peyote and not work the day after using peyote, instead of taking one week's vacation after each use; the job would be based in Albuquerque, where he could be supervised; and the offer included $500 in back pay. Toledo rejected the offer because he believed that Nobel would use the polygraph test, physical exam, and road test to unjustly disqualify him as an excuse not to hire him; because the $500 back pay offer was too low; and because he objected to revealing the timing of his peyote ceremonies. Toeldo did not make a counter offer. Toledo's position was, and still is, that he should be hired as a truck driver with no restriction on his use of peyote in religious ceremonies.

Peyote is a small, spineless cactus that grows in the Rio Grande valley of Texas and northern Mexico. Its scientific name is *Lophophora williumii*. Native American religious use of peyote was discovered by Spanish explorers in the 1600's, and has continued to the present. It was documented among the Cherokees in the 1800's. Peyote use exists today among about 50 tribes in the United States.

Native religious use of peyote was first declared illegal in the 1600's, and efforts to ban religious use of peyote have been made since that time. The Church was established in 1918 in Oklahoma and has since spread through the country, and exists among the Navajo today. It is

simply a corporate form for the preexisting peyote religion and it did not change the peyote religion's practices or beliefs.

Church peyote users believe that peyote is a sacred and powerful plant. Peyote is seen as a medicine, a protector, and a teacher. In terms used by other religions, peyote can be called a sacrament, something which when eaten gives awareness of God. The use of peyote is central to the Native American peyote religion. The religion teaches that those who use peyote must not use alcohol. It encourages love of parents and obedience to parents, fidelity to a spouse, and charity towards others. The peyote religion does not prohibit members from also practicing other religions.

Peyote ceremonies are held upon request for healing, to honor a person, or to send someone away or welcome them home. They can be held on any night of the week, but are generally held on Friday or Saturday nights.

The ceremonies which Toledo attends are generally attended by 15 to 20 people. They are held in a hogan or tepee. A Road Man directs each ceremony. The ceremony progresses through ritualistic stages, including singing, praying, drumming, lighting and burning a fire, and passing and drinking cups of water with floating peyote buttons in them. The peyote cups are generally passed twice, both times before midnight. Midnight marks a dividing point in the ceremony. Singing, praying and drumming continue until dawn. The participants stay awake all night and the next day. Toledo would usually go to sleep at about 4:00 or 5:00 P.M. on Sunday if it was a Saturday night ceremony, and sleep until his normal waking time on Monday morning. This gave him twelve or more hours of sleep.

If Toledo was a participant in a ceremony for another's benefit, he would usually take peyote only on the first pass. If he had called a ceremony, he would take peyote

on both passes. His intake, therefore, varied from one to four cups of liquid per ceremony, each cupful containing four to six buttons of peyote. Peyote buttons are slices of the peyote cactus about the size of a quarter. They are chewed up and swallowed. The major psychoactive alkaloid in peyote is mescaline. An average button contains 20 to 45 milligrams (mg.) of mescaline. Toledo weighed 245 pounds or 110 kilograms (kg.). Assuming an average 35 mg. of mescaline per button and five buttons per cup, Toledo's dose could have ranged from 1.6 mg. of mescaline per kg. of body weight (one cup with five buttons) to 6.4 mg. of mescaline per kg. of body weight (four cups with five buttons each, or twenty buttons).

Doses of one to three mg. of mescaline per kg. of body weight are known to produce illusions, or sensory distortions. Doses of 5 mg. kg. are known to produce hallucinations, or sensations of things which do not in fact exist. Other general psychological effects include mood evaluation, creating a sense of contentment or well-being, introspection, depersonalization (feeling detached from oneself), and an altered time sense.

Toledo testified that the effects of peyote for him usually last three to four hours. Experts testified that the effects could last up to twelve hours after ingestion, and peyote could be found in the body up to twenty-four hours after ingestion. Reactivation experiences, which are psychological sensations reliving what was sensed when under the influence of peyote, have been recorded as long as 36 hours after ingestion. Toledo has never had a reactivation experience. The experts agreed that a peyote user should not drive a truck for about 24 hours after ingesting peyote in amounts greater than one mg. of mescaline per kg. of body weight.

II. Toledo's Prima Facie Case

42 U.S.C. § 2000e-2(a) states that "[i]t shall be an unlawful employment practice for an employer to fail or

refuse to hire . . . any individual . . . because of such individual's . . . religion. . . ." A plaintiff makes out a *prima facie* case of religious discrimination in hiring if he proves that he has a *bona fide* religious belief or practice that conflicts with an employment requirement, that he informed the employer of this belief or practice, and that he was not hired because he could not comply with the conflicting employment requirement. *See Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir.1984).

The parties have stipulated that the Church is a religion, and that the members' use of peyote is a religious use. Toledo proved that his own use of peyote was a sincere religious use. Toledo carries a Church membership card. He testified that he only used peyote in the ceremonies of the Church, and never used it on his own outside of religious services.

The conflict between Toledo's peyote use and Nobel's policy of not hiring truck drivers who use illegal drugs or have used them in the last two years was made clear at Toledo's interview with Plagmann. Toledo informed Nobel of his religious use of peyote. Nobel refused to hire him because his religious practice conflicted with an employment requirement.

Toledo has carried his burden of proof in proving a *prima facie* case of religious discrimination in hiring.

III. Nobel's Defenses

42 U.S.C. § 2000e(j) defines the term religion. In conjunction with § 2000e-2(a), subsection (j) requires that an employer not discriminate against any religious observance, practice or belief "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Nobel first

claims that it could not have made any accommodation to Toledo's religious practice without undue hardship. Nobel then claims that if it was required to accommodate, then its accommodation offers of May 17 and July 10, 1984, were reasonable. I conclude that Nobel could have accommodated Toledo's religious practice without undue hardship by restricting his practice slightly, and that the accommodation offer of July 10, 1984, was reasonable. To require more accommodation and less restriction would bring about undue hardship.

A. Undue Hardship. Nobel clearly did not make any effort to accommodate Toledo before refusing to hire him on March 13, 1984. Nobel now claims that it did not need to make any effort to accommodate because any accommodation would have imposed undue hardship. Toledo argues that an employer cannot claim the defense of undue hardship without first showing some effort at accommodation. Otherwise, the claim of undue hardship is pure speculation. The cases are unclear on this issue.

The Tenth Circuit has held both that an employer must first show some effort at accommodation and then show that further accommodation would result in undue hardship, *U.S. v. City of Albuquerque*, 545 F.2d 110, 113 (10th Cir.1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1092 (1977); *Williams v. So. Union Gas Co.*, 529 F.2d 483, 488-89 (10th Cir.1976), *cert. denied*, 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976), and that an employer can claim undue hardship without showing any effort to accommodate. *Pinsker v. Joint Dist. No. 28-J*, 735 F.2d 388, 390 (10th Cir.1984); citing *McDaniel v. Essex Intern'l, Inc.*, 571 F.2d 338, 341 (6th Cir.1978).

The Tenth Circuit's statement in *Pinsker* shou'd control here. "Simply put, Title VII requires reasonable accommodation *or* a showing that reasonable accommodation would be an undue hardship on the employer." *Pinsker* at 390 (emphasis supplied). The plain words of the statute require that an employer demonstrate that he is *unable*

to do something without undue hardship. By proving undue hardship in taking any action, the employer has shown that he is unable to take any action, thus complying with the statute. To require the employer to make some attempt at reasonable accommodation when any action would result in undue hardship, is to require a futile act. The facts in this case clearly warrant consideration of Nobel's defenses despite its failure to make any attempt at accommodation on March 13, 1984.

First, Nobel raises three related reasons why hiring Toledo under any circumstance would be undue hardship. It argues that a Department of Transportation (DOT) regulation, the Nobel drug policy and the Nobel lease agreement with Ryder Truck Rental, Inc. all prohibit hiring a driver who uses illegal drugs. All three arguments can be disposed of by the understanding that Toledo's use of peyote in religious ceremonies does not constitute use of an illegal drug.

The DOT regulation, 49 C.F.R. § 392.4 (1983), which was in effect on March 13, 1984, stated:

> (a) No person shall operate, or be in physical control of, a motor vehicle if he possesses, is under the influence of, or is using, any of the following substances:
>
> (1) A narcotic drug or any derivative thereof;
>
> (2) An amphetamine or any formulation thereof (including, but not limited to "pep pills" and "benzies");
>
> (3) Any other substance, to a degree which renders him incapable of safely operating a motor vehicle.

Sections 392.1 and 392.4(b) require a motor carrier to comply with these rules and not permit its drivers to violate them. Presumably these sections make a carrier liable to DOT regulatory sanction if it allows its drivers to violate these rules.

Peyote is neither a narcotic (it is not addictive) nor an amphetamine nor any derivative or formulation thereof. It is a hallucinogen. Therefore it is addressed under section (a)(3), a substance which can render a driver incapable of safely operating a truck. I interpret the regulation to prohibit possession, driving under the influence of, or use (consumption) of peyote while operating or physically controlling a truck. It does not prohibit use or possession while off duty. Toledo testified that he never possessed or used peyote outside of Church ceremonies. Therefore, the only prohibited activity is for Toledo to drive a truck under the influence of peyote. Toledo could present a significant safety hazard if he were to drive a tractor-trailer truck under the influence of peyote.

But Nobel could have hired Toldeo and not violated the rule if it had simply insured that Toledo would not drive while under the influence of peyote. It did this adequately in its accommodation offer of July 10, 1984, by providing that Toledo take one day off after each use of peyote. Nobel therefore could have reasonably accommodated Toledo without the undue hardship of being forced to violate the DOT regulation.

Although the above-quoted version of 49 C.F.R. § 392.4 was in effect in March, 1984, a change had been proposed in November, 1980. 45 Fed.Reg. 77470 (1980). The trucking industry was aware of the proposed change. The proposed version went into effect on December 5, 1984. 49 Fed.Reg. 44215 (1984).

The amended version of § 392.4 changed the wording of subsection (a) to read "no driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or substances: (1) any Schedule I drug or other substance identified in Appendix D to this subchapter." Subsections (2), (3) and (4) went on to list the amphetamines, narcotics, and "any other substance" which were already listed in the old version.

The amended version does not change the considerations regarding whether Toledo could drive a truck for Nobel under the regulation. It still only prohibits possession, driving under the influence of, or use of peyote while on duty, with no prohibition of off-duty possession or use. The amended DOT regulation did list both peyote and mescaline on Schedule I, entitled "Controlled Substances".

Peyote and mescaline have been listed on the Department of Health, Education and Welfare's (HEW) Schedule I, with an exemption for religious use. 31 Fed.Reg. 4679 (1966). Congress had created the schedules of controlled substances in the Drug Abuse Control Amendments of 1965, 79 Stat. 226 § 3(a). When the House of Representatives passed the Amendments as H.R. 2, it exempted from control "peyote (mescaline) but only insofar as its use is in connection with the ceremonies of a certified religious organization." 111 Cong. Rec. 14608 (1965). The Senate committee removed peyote and its religious exemption from the list, preferring that such drugs be added to the list on a case-by-case basis by the Secretary of HEW, based on scientific review and the recommendations of advisory groups. S.Rep. No. 89-337, quoted at 111 Cong.Rec. 14609 (1965), U.S. Code Cong. & Admin.News 1965, P. 1895. The Senate and the House then passed the bill without peyote or its religious exemption listed. In debate on the House floor, Congressman Harris assured House members that omitting the religious exemption did not prevent *bona fide* religious use be ause courts had upheld peyote users' First Amendment right to use peyote. Congress therefore passed the 1965 Amendments with the understanding that *bona fide* religious use of peyote was exempt from regulation.

The Department of HEW then added peyote and mescaline to Schedule I by administrative regulation in 1966, with an exemption holding for nondrug use in *bona fide* religious ceremonies of the Church. 31 Fed.Reg. 565, 4679 (1966).

When Congress passed the Controlled Substances Act of 1970, 84 Stat. 1242, it enacted Schedule I into law, 21 U.S.C. § 812(c) and 21 C.F.R. § 1808.11. During hearings on the 1970 Act, Congressman Satterfield expressed concern that the peyote religious use exemption be protected. The Bureau of Narcotics and Dangerous Drugs (BNDD) assured him that it would be taken care of by regulation. Drug Abuse Control Amendments of 1970; Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce; H.R., 91st Cong.2d Sess. 117-18 (1970). BNDD then added the religious use exemption to its Schedule I by regulation on April 24, 1971. 86 Fed.Reg. 7776, 7802 (1971). It states, "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in *bona fide* religious ceremonies of the Native American Church. . . ." 21 C.F.R. § 1807-31 (1983). *See also Native American Church of New York v. U.S.*, 468 F.Supp. 1247 (S.D.N.Y.1979) for legislative history.

Schedule I, after 1971, does not prohibit Church religious use of peyote. Therefore, the DOT prohibition of Schedule I drug use by truck drivers in the December 5, 1984 amended version of 49 C.F.R. § 392.4 did not prohibit such religious use. Toledo's use of peyote is not use of a Schedule I drug However, the amended version of § 392.4 still prohibits Toledo from driving under the influence of peyote, under the wording of subsection (a)(4) which prohibits "any other substance, to a degree which renders a driver incapable of safely operating a motor vehicle." Neither Congress, HEW nor BNDD have licensed Toledo to drive while under the influence of peyote. They have simply licensed him to use peyote in religious ceremonies without prohibition The amended version of § 392.4 could be complied with if Nobel took action to insure that Toledo does not drive while under the influence. Nobel could have accommodated Toledo without undue hardship.

Nobel's arguments under its own company policy and its lease with Ryder can be disposed of similarly. Nobel policy prohibited the sale, purchase, possession or use of illegal drugs by employees on company property or during working hours. It also prohibited employees from reporting to work under the influence of illegal drugs. Nobel did not hire drivers who had used illegal drugs within the two years prior to their hiring. Nobel's lease with Ryder, from whom it leased all its trucks, provided that Ryder could remove any driver, cancel its lease or cancel its insurance if any driver used drugs or operated trucks under the influence of drugs which impair the driver's ability to operate the truck. The Ryder Safety Manual also prohibited "drug abuse". As noted above, Toledo's use of peyote was not an illegal use, so did not violate Nobel policy. By requiring Toledo to take a day off after each use of peyote, Nobel would have been complying with the Ryder lease terms on use or being under the influence of drugs while on the job. Toledo's religious use was not drug abuse. Therefore, neither Nobel nor Ryder policies prevented Nobel from hiring Toledo with the reasonable restriction of requiring Toledo to take a day off after each use.

Second, Nobel argues that hiring a known drug user would open it up to negligent entrustment and punitive damages liability if Toledo were involved in an accident while on duty, and that such increased liability would be undue hardship. Nobel justifiably considered this possibility as a serious problem. However, Nobel would not be opening itself up to new lawsuits, but simply to additional claims in lawsuits it would already be defending under the theory of *respondeat superior*. Also, the problem nearly evaporates when considered in light of the fact that Toledo's use of peyote was not use of an illegal drug, and that his work hours could be restricted so that he was never on duty when possibly under the influence of peyote. Therefore Nobel's hypothetical increased liability does not qualify as an undue hardship.

Third, Nobel raised a specter of having to pay overtime wages and alter its seniority system in accommodating Toledo as grounds for undue hardship. Nobel argues that if Toledo could not work on a particular Sunday, Nobel would either have to bring in another Farmington-based delivery driver and pay him overtime wages, or send a driver with a load from Albuquerque and have him also make the deliveries outside of Farmington. The Supreme Court has held that it is undue hardship for an employer to incur more than a *de minimis* cost in overtime wages or have to alter its seniority provisions in order to accommodate an employee's religious practices. *TWA, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

I find that under the facts of this case the payment of overtime wages would be a *de minimis* cost. Toledo has variously stated that he goes to peyote services from two to four times a year. The driver that Nobel hired instead of Toledo was required to work four Sundays during the remaining nine months of 1984, or about five Sundays per year. It is unlikely that very many peyote services would overlap with Sundays Nobel required him to work. However, assuming that there were two Sundays per year when Nobel had to pay overtime to replace Toledo, and that the replacement driver worked ten hours per day at $10.20 per hour (Nobel's wage for a driver after one year), Nobel would pay $102 in overtime wages ($5.10 overtime pay × 10 hrs. × 2 days). If Nobel had to replace Toledo on four Sundays, it would pay $204 in overtime wages. This amount, or even double this amount, would be a *de minimis* cost for a company such as Nobel.

As for seniority, Nobel never proved that the drivers it would replace Toledo with would be drivers with more seniority. Presumably, Toledo would be lowest on the seniority list at first, but would have more seniority than more newly hired drivers after several months or years. At that point, he could be replaced with drivers of less

seniority. Also, Nobel never proved that it could not replace Toledo without violating the seniority provisions of its contract with the Teamsters Union.

Therefore, I conclude that Nobel would not incur undue hardship from paying overtime wages or altering its seniority provisions.

Because Nobel failed to prove that any accommodation would have resulted in undue hardship, and it failed to make any effort at reasonable accommodation on March 13, 1984, that decision of refusing to hire Toledo was a discriminatory decision.

B. Reasonable Accommodation. After its initial discriminatory decision, Nobel offered to accommodate Toledo's religious practice on May 17, 1984 and July 10, 1984. I find that these were good faith offers, and that their status as settlement offers during adversary proceedings before the NMHRC does not prevent them from being accommodation offers as well. Nobel was not only interested in settling the case, it was interested in hiring Toledo in such a manner that he could continue his religious practices and yet not be a safety hazard on the road.

The Nobel offer of July 19, 1984 was a reasonable accommodation offer. It allowed Toledo to attend peyote ceremonies twice a year, the number of times Toledo stated in his discrimination charge to the NMHRC. To remove any possibility that he would drive under the influence of peyote, the offer required Toledo to take a day off after each use of peyote. This was not a day off without pay, but was his normal Sunday off. To allow Nobel to plan for Toledo's replacement if Sunday work were required, the offered required one week's notice of his peyote use. To allow Nobel to supervise Toledo on the days after he used peyote, the offer required that Toledo work out of the Albuquerque office. These were all reasonable requirements. The offer also included $500 of back pay.

This may not have been the most reasonable offer. It may have been more reasonable to allow Toledo four or more peyote ceremonies per year, or only a few days notice instead of a week, or more back pay. But, Toledo refused to deal with Nobel. Toledo had a duty "to attempt to accommodate his beliefs himself and to cooperate with attempts at reasonable accommodation by his employer." *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977). The premise for Title VII's requirement of reasonable accommodation short of undue hardship is bilateral cooperation. *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 145 (5th Cir.1982). "Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by his employer." *Id.* at 146. *See also U.S. v. City of Albuquerque, supra; American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir.1986).

Nobel's July 10 reasonable offer cured its March 18 discriminatory decision. Because Toledo refused to negotiate or try to cooperate with Nobel's accommodation offer, I also conclude that the offer absolves Nobel of liability for that discriminatory decision. Theoretically, Nobel is still liable for the four months during which it discriminated against Toledo. Since Toledo turned down the offer to be hired, the only possible damages owed to Toledo are four months of back wages reduced by the amount Toledo earned during that time. This amount was not proved at trial. It would likely be more than the $500 offered, but Toledo failed in his duty to negotiate a more reasonable amount. Therefore, I allow the $500 offer to stand as a reasonable offer. Toledo has already rejected it, so no award of back wages is justified.

IV. Conclusion

It is crucial to this case that Nobel required a driver that was available to drive seven days a week. The proposed driver would normally work Monday to Saturday

but had to be available to drive on Sundays. If Toledo drove a truck on the Sunday morning after a Saturday night peyote ceremony, he would have presented a significant safety hazard. Some restriction by Toledo of his religious practice was required along with some accommodation by Nobel of Toledo's practice.

Nobel initially discriminated against Toledo by failing to hire him on March 18, 1986. Nobel could have reasonably accommodated Toledo's religious practice without undue hardship. Nobel had a duty at that time to investigate the properties of peyote and the way Toledo used it sufficiently to have tried to propose a reasonable accommodation. It did not do so.

However, Nobel cured its initial discriminatory decision by making a reasonable offer of accommodation four months later. Toledo accepted that offer, and his complaint for religious discrimination must therefore be dismissed. Now, Therefore,

IT IS ORDERED that the complaint and the cause of action are hereby dismissed on the merits.

ON MOTION FOR REVIEW OF COSTS

This matter came on for consideration on plaintiff's motion for review of the Clerk's order settling costs. Having considered the motion and the briefs of counsel, I find that plaintiff's motion is well taken and it will be granted in part and denied in part.

Plaintiff objects to the Clerk's taxing of costs in favor of defendant and against plaintiff with regard to Don Asa, Robert Collins, James Etherton, and Rodney Plagmann. Plaintiff's objections to the award of costs for James Etherton and Rodney Plagmann are well taken; his objections to the awarding of costs for Don Asa and Robert Collins are not well taken.

Rodney Plagmann: Defendant has agreed that this item of costs was improper as plaintiff had already paid Mr. Plagmann a witness fee.

James Etherton: D.N.M.R. 15(d)(3)(a) states that "[n]o party shall receive witness fees or allowances." Mr. Etherton was, at the time of trial, director of personnel for defendant, and was the only executive to appear for defendant. While Mr. Etherton was called as a witness on only the first day of trial, he was present throughout the trial. For purposes of the allocation of costs, Rule 15(d)(3)(a) distinguishes between witnesses and parties (or representative of a company which is a party). Mr. Etherton served as representative for Nobel-Sysco, Inc. at trial, and therefore his costs are disallowed.

Don Asa and Robert Collins: Plaintiff objects to the award of costs for these witnesses, characterizing them as "unnecessary" and stating that I had discouraged defendant from calling these individuals as witnesses. Nevertheless, both men did testify, and 28 U.S.C. § 1920(3) does allow for taxing of costs for witnesses. I see no reason to alter the Clerk's order with regard to the costs of either of these witnesses.

Finally, plaintiff contends I may deny some witness expenses because the witness traveled from beyond the subpoena power of this court. Plaintiff relies on *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 18 L.Ed.2d 248 (1964). Indeed, *Farmer* does stand for the proposition that a district court is plainly vested with the power to rely on its discretion in awarding or refusing to award costs outside the 100-mile area. *Farmer*, *supra* at 282, 85 S.Ct. at 415. However, I see no reason to alter the Clerk's order with regard to these costs (applicable to Don Asa only, as no costs will be allowed for James Etherton). Now, Therefore

IT IS ORDERED that plaintiffs' motion for review be granted with respect to costs for James Etherton and Rodney Plagmann and denied with respect to Robert Collins and Don Asa.

No. 89-1525

In The

Supreme Court of the United States

October Term, 1989

NOBEL-SYSCO FOODS SERVICES CO.,

Petitioner,

v.

WILBUR TOLEDO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's offer to settle an administrative charge of religious discrimination in hiring constitutes an attempt to accommodate the prospective employee's religious practices.

2. Whether the Court of Appeals erred in imposing Title VII liability upon Petitioner by affirming the District Court's findings that Petitioner did not make any attempt to accommodate Respondent's religious practices before refusing to hire him, and that Petitioner could have accommodated such practices without undue hardship.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

STATUTES AND REGULATIONS INVOLVED: RESPONDENT'S SUPPLEMENT

Relevant portions of the Department of Transportation regulations provide:

49 C.F.R. §391.81(b): This subpart prescribes minimum Federal safety standards to detect and deter the use of controlled substances as defined in 49 CFR Part 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP)).

49 C.F.R. §40.21: (a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines and phencyclidine.

(b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the Department of Health and Human Services has established an approved testing protocol and positive threshold for each such substance.

(c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations.

STATEMENT OF THE CASE: RESPONDENT'S SUPPLEMENT

Respondent Wilbur Toledo (Toledo) is an enrolled member of the Navajo Tribe of Indians. He has been a member of the Native American Church (Church) since 1983, and has made sacramental use of peyote in Church ceremonies. Such religious use of peyote is legal in the relevant jurisdictions of New Mexico, Colorado, and the Navajo Nation.

By the time of trial in 1986 Toledo had successfully worked for four employers, in various jobs involving heavy equipment operation and truck driving, while an active member of the Church. He has not had an accident of any type while working as a commercial driver, let alone an accident caused by or associated with his participation in Church ceremonies.

Petitioner Nobel-Sysco Foods Services Co., Inc. (Nobel) has provided an incomplete and erroneous description of the actions that culminated in its refusal to hire Toledo to work as a driver. Nobel states that it refused to hire Toledo because it believed that, if it hired Toledo, it would be in violation of regulations of the Department of Transportation, would assume an unacceptable risk of liability, and would face cancellation of its truck lease with Ryder Truck Rental. Pet. for Cert., p. 4. However, only one of these concerns was found by the District Court to have motivated Nobel to refuse to hire Toledo; the District Court found that Nobel decided not to hire Toledo because of the risk of potential tort liability. *Toledo v. Nobel-Sysco, Inc.*, 651 F.Supp. 483, 486 (D.N.M. 1986). The Court of Appeals did not modify this finding. *Toledo*

v. Nobel-Sysco, Inc., 892 F.2d 1481, 1484 (10th Cir. 1989). The remaining concerns set forth by Nobel did not enter into Nobel's refusal to hire Toledo, but were raised in the present litigation to justify that refusal.

The District Court found that Nobel did not offer any accommodation of Toledo's religious practices. *Toledo*, 651 F.Supp. at 486. James Etherton, Nobel's director of personnel, testified that he did not even consider making any type of accommodation of Toledo's practices. (Transcript at 109). After Toledo was told by Rodney Plagmann, the Nobel interviewer, that Nobel would not hire him, Toledo asked Plagmann if he could contest Nobel's refusal to hire him. Plagmann told Toledo to "do whatever you have to." (Transcript at 20).

After Toledo filed his discrimination charge administratively, Nobel made two offers to Toledo through the New Mexico Human Rights Commission that Nobel describes to this Court as "accommodation offers". The second offer, at issue in this litigation, was, like the first offer, not just an accommodation offer but instead an attempt to settle Toledo's pending charge of discrimination. While Nobel informs this Court of the actions that it was committed to take under the terms of the proposed settlement, Nobel's description omits the crucial fact that the settlement proposal required Toledo to dismiss his administrative charge of discrimination. The offer of $500.00 in backpay was a compromise of Toledo's claim for accrued backpay of approximately $4,400.00.

REASONS FOR DENYING THE WRIT

Nobel's arguments before this Court may be reasonably distilled into three subjects. First, Nobel attacks the ruling that a settlement offer made during administrative conciliation does not constitute an "accommodation attempt" under 42 U.S.C. §2000e(j), contending that this ruling amounts to a strict liability standard under Title VII. Pet. for Cert., p. 6. Second, Nobel argues that the Court of Appeals has eliminated the duty of an employee to participate in administrative conciliation. Pet. for Cert., p. 6-7. Third, Nobel assails the Court of Appeals' holding that an employer in a religious discrimination case must either prove that it actually attempted to accommodate a prospective employee's religion, or that it could not make any accommodation without undue hardship. Pet. for Cert., p. 7.

Nobel's predominant points are discussed in detail below. Initially, however, it must be noted that Nobel mischaracterizes the decision of the Court of Appeals. The Court of Appeals did not issue an extraordinary decision or utilize innovative analyses. The decision of the Court of Appeals adheres to Title VII precedent, and is closely tied to the facts that were found by the District Court. The decision does not raise important questions of federal law that require review by this Court.

I. THE COURT OF APPEALS' HOLDING THAT A SETTLEMENT OFFER MADE DURING ADMINISTRATIVE CONCILIATION IS NOT AN ACCOMMODATION ATTEMPT DOES NOT CREATE A STRICT LIABILITY STANDARD.

The Court of Appeals held that Nobel's settlement offer, made to Toledo during administrative conciliation

of his charge of religious discrimination by the New Mexico Human Rights Commission, did not constitute an attempt to reasonably accommodate religion under 42 U.S.C. §2000e(j). *Toledo*, 892 F.2d 1481. The Court of Appeals found that the settlement offer was conditional upon Toledo passing several tests, and upon his dismissing his discrimination charge. The Court of Appeals reversed the District Court's holding that such a settlement offer could "cure" Nobel's discriminatory refusal to hire Toledo. *Toledo*, 892 F.2d at 1488.

Nobel argues that the holding of the Court of Appeals creates a "strict liability" standard for employers under Title VII. Pet. for Cert., p. 6. Nobel's argument is not entirely clear.[1] Nobel appears to be contending that the Court of Appeals has deprived an employer of the opportunity to cure a discriminatory refusal to hire prior to judgment in litigation over that refusal to hire.

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[1] Nobel's use of the term "strict liability" is particularly unusual and confusing. Strict liability is a tort law concept imposing liability when harm is caused by a defective product or by a narrow range of dangerous but socially desirable activities, such as the collection of water on land, blasting, or keeping dangerous animals. In contrast to most forms of tort liability, strict liability may be imposed without a showing of fault in the conduct of the activity that has caused harm. 3 F. Harper, F. James & O. Gray, *The Law of Torts* 184 (2d ed. 1986). Title VII liability is, of course, a form of statutory liability based upon a violation of the terms of the Civil Rights Act of 1964. The tort concept of strict liability has no bearing upon, or place in, an analysis of a Title VII claim. The Court of Appeals did not use, or purport to use, a strict liability analysis in its decision in the present case.

In fact, the Court of Appeals has not deprived employers of techniques for limiting liability. This Court has held that an employer may toll back pay liability by making an unconditional offer of employment. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). An employer may make a victim of discrimination whole, and thus "cure" the discriminatory act, by making not only an unconditional offer of employment but also an offer of accrued backpay and attorney's fees, if incurred. Indeed, Nobel itself recognizes that a victim of discrimination may be made whole through hiring, front and back pay, and attorney's fees. Pet. for Cert., p. 10. Employers have made such "curing" offers in appropriate cases. Nobel is simply wrong when it asserts, Pet. for Cert., p. 8, that a refusal to hire cannot be cured through conciliation by a subsequent offer of employment with backpay.

Nobel errs, therefore, when it argues that liability was found because the Court of Appeals imposed strict, or *per se*, liability upon Nobel. Rather, Nobel faces judgment because it failed to make any effort to accommodate Toledo's religious practices before refusing to hire him, and because it did not prove that accommodation would result in undue hardship. Nobel faces a claim for backpay because it did not act properly to limit its liability under well-established Title VII law.

In particular, the settlement offer made by Nobel to Toledo, through the New Mexico Human Rights Commission, included a promise of an offer of employment that was conditioned upon passing several tests. The settlement offer also proposed that Toledo accept 1/9 of his accrued backpay claim, and required that he dismiss his discrimination charge. As the Court of Appeals observed,

such an offer would not even toll backpay liability, let alone cure Nobel's previous discriminatory refusal to hire. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. at 232 n. 18; *Toledo*, 892 F.2d at 1488.

Thus, the Court of Appeals did not create a strict liability standard for religious discrimination litigation under Title VII. The Court of Appeals simply applied the reasoning in *Ford Motor Co. v. E.E.O.C.* to the facts of this case, which involve an employer's exceptional refusal to make any effort to accommodate the religious practices of a prospective employee until attempting to settle his charge of discrimination. The decision of the Court of Appeals is not in conflict with holdings of other circuits, and does not raise an important question of federal law.

II. THE COURT OF APPEALS' RULING THAT AN EMPLOYER MUST ATTEMPT TO ACCOMODATE RELIGIOUS PRACTICES OR PROVE THAT IT COULD NOT ACCOMODATE WITHOUT UNDUE HARDSHIP DOES NOT CREATE A STRICT LIABILITY STANDARD AND IS CONSISTENT WITH PRECEDENT.

The Court of Appeals ruled that an employer must either prove that it made some effort to accommodate a prospective employee's religion, or that no accommodation could be made without undue hardship. *Toledo*, 892 F.2d at 1490. If the employer is unable to make either of these two showings, then the employer will be found to have breached its statutory duty to accommodate religious practices. *Id.*

Nobel muddles an attack upon this holding with its criticism of the Court of Appeals' ruling that a settlement

offer made during administrative conciliation is not an accommodation attempt. Pet. for Cert., p. 8-9, 11-12. Nobel argues that the holding that an employer must prove attempted accommodation, or the unavailability of any accommodation without undue hardship, results in strict liability under Title VII. Pet. for Cert., p. 9. This argument is blurred with Nobel's contention that Court of Appeals imposed strict liability by ruling that Nobel's offer to settle Toledo's discrimination charge does not constitute an accommodation attempt. Later, in a different and unrelated section of its Petition for Certiorari, Nobel contends that the Court of Appeals' ruling conflicts with decisions from other circuits. Pet. for Cert., p. 16.

Nobel describes dire consequences that it asserts will follow from the burden of proof articulated by the Court of Appeals. Pet. for Cert., p. 8-9. However, Nobel's description reveals a fundamental misunderstanding of the decision of the Court of Appeals.

The Court of Appeals did not, as suggested by Nobel, Pet. for Cert., p. 9, require an employer to accommodate the religious practices of all prospective employees. Rather, the court asked only that the employer *attempt* to accommodate. In the present case, Nobel did not even consider attempting to accommodate Toledo's religious practices before refusing to hire him, let alone actually make an active attempt at accommodation.

Further, the Court of Appeals did not impose an absolute requirement that all employers must attempt to accommodate all religious practices of all employees. Rather, the court allowed an employer who makes no

effort to accommodate religious practices to escape liability if it shows that no accommodation could have been made without undue hardship. *Toledo*, 892 F.2d at 1490.

The Court of Appeals adopted this approach by accepting Nobel's argument that an employer should not be required to make futile attempts to accommodate religious practices, recognizing that there will arise rare cases in which a job is completely incompatible with a religious practice. *Toledo*, 892 F.2d at 1489-1490. Indeed, before the Court of Appeals Nobel endorsed the regulation of the Equal Employment Opportunity Commission, 29 C.F.R. §1605.2(c)(1), providing that an employer may justify a refusal to accommodate only by proving that undue hardship would result from each available alternative method of accommodation. Appellee/Cross-Appellant's Brief at 13-14. Nobel's position in the District Court on this issue was similar. "Nobel now claims that it did not need to make any effort to accommodate because any accommodation would have imposed undue hardship." *Toledo*, 651 F.Supp. at 488.

Thus, while Nobel complains of the analysis utilized by the Court of Appeals, that court simply adopted the approach that Nobel argued was appropriate. Toledo had argued that Nobel's evidence of undue hardship should not be considered because Nobel failed to make any attempt to accommodate Toledo's religious practices before refusing to hire him. The Court of Appeals explicitly rejected Toledo's position, *Toledo*, 892 F.2d at 1489-1490, and reviewed Nobel's evidence, 892 F.2d at 1490-1492. Nobel is dissatisfied, then, not with the method of analysis utilized by the Court of Appeals, but rather with the results of the application of this analysis to the facts of

this case. However, the District Court and Court of Appeals were of one mind on the proper resolution of these factual issues.

The District Court determined that Nobel could have hired Toledo without violating the regulations of the Department of Transportation, the terms of its own policies, or the terms of its lease with Ryder Truck Rental. *Toledo*, 651 F.Supp. at 489-491. The Court of Appeals ruled that these findings were not clearly erroneous. *Toledo*, 892 F.2d at 1490-1491.

The District Court determined that Nobel's hypothetical claim of increased tort liability that could result from hiring Toledo did not constitute an undue hardship. *Toledo*, 651 F.Supp. at 491. The Court of Appeals agreed that the hypothetical liability was too speculative to constitute undue hardship, and ruled that the District Court's findings were not clearly erroneous. *Toledo*, 892 F.2d at 1492.

The District Court found that any increased overtime costs that might result from accommodating Toledo's religious practices were *de minimis*, and that Nobel had not proven that accommodation would require alteration of Nobel's seniority system. *Toledo*, 651 F.Supp. at 491. The District Court's findings of fact were not challenged by Nobel before the Court of Appeals.

In sum, the Court of Appeals simply affirmed the District Court's factual finding that Nobel had failed to prove that it could not accommodate Toledo's religious practices without undue hardship. In doing so, the Court of Appeals did not create a strict liability standard, and

did not decide an issue of federal law of national importance. The factual rulings of the lower courts do not warrant review by this Court.

In a later portion of its Petition for Certiorari, Nobel asserts that there is a conflict between the decision of the Court of Appeals and decisions from the Sixth, Seventh, and Ninth Circuits. Pet. for Cert., p. 16, citing *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981), *cert. den.* 454 U.S. 1046 (1981), *Anderson v. General Dynamics Convair Aerospace Div'n*, 589 F.2d 397 (9th Cir. 1978), *cert. den.* 442 U.S. 921 (1979), and *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978). Nobel argues that these decisions allow an employer to demonstrate undue hardship without having made an accommodation offer, and that this burden of proof conflicts with that articulated by the Court of Appeals.

Nobel does not allege a conflict arising from the specific holdings of these circuit courts, or from the principles underlying the holdings. Nobel asserts only that the description of the employer's burden of proof in these decisions differs from that set forth by the Court of Appeals in the present case. Such a conflict would not be of sufficient importance to require review by this Court. More importantly, the conflict perceived by Nobel does not exist.

In *Nottelson v. Smith Steel Workers*, 643 F.2d at 450, the Seventh Circuit stated that employers and unions must make a reasonable accommodation of an employee's religious practices or show that to do so would cause undue hardship. The court did not further discuss the burden of proof, and did not address the situation in which an

employer fails to make any attempt at all to accommodate. The Court of Appeals' holding that Nobel must prove either that it attempted to accommodate Toledo's religious practices, or that it could not offer any accommodation without undue hardship, does not conflict with the *Nottelson* holding. Both courts utilized a disjunctive test. Indeed, the burden of proof set forth by the Court of Appeals demands less of an employer than that set forth by the *Nottelson* court, since *Nottelson* required accommodation or a showing of undue hardship, while the Court of Appeals demanded only an attempt at accommodation or a showing of undue hardship.

The Ninth Circuit decision in *Anderson v. General Dynamics* required that the employer prove that it made a good faith effort to accommodate the employee's religious practices and, if those efforts failed, that it could not reasonably accommodate without undue hardship. 589 F.2d at 401; Pet. for Cert., p. 16. The Sixth Circuit in *McDaniel v. Essex Int'l, Inc.*, 571 F.2d at 341, like the court in *Nottelson*, held that the employer must prove that a reasonable accommodation was made, or that reasonable accommodation would work an undue hardship. However, the *McDaniel* court went on to observe that its prior decisions did not excuse an employer from making any effort to accommodate religious practices. 571 F.2d at 342.[2]

The decision of the Court of Appeals is consistent with both *Anderson* and *McDaniel*. Like the *Anderson* and

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[2] Oddly, Nobel cites *Anderson* and *McDaniel* as decisions that are both consistent with, and in conflict with, the *Nottelson* decision. Pet. for Cert., p. 16.

McDaniel courts, the Court of Appeals recognized an employer's duty to make an attempt to accommodate religious practices. However, the Court of Appeals imposed less of a burden upon employers than either the *Anderson* or *McDaniel* courts, since the Court of Appeals allowed an employer to forego any attempt at accommodation if the employer could prove that any accommodation would result in undue hardship. The *Anderson* and *McDaniel* courts did not include this alternative in their discussions.

In summary, the Court of Appeals utilized a burden of proof that is consistent in principle with that used by the *Anderson* and *McDaniel* courts to encourage an employer to actively engage in accommodation attempts, but that is also consistent in principle with that utilized by courts that seek to eliminate the need for futile accommodation efforts where no accommodation can be made without undue hardship. *Toledo*, 892 F.2d at 1489-1490. The Court of Appeals' decision is, as well, consistent with the burden of proof recited in *Nottelson*. Rather than conflict with the decisions from other circuits cited by Nobel, then, the decision of the Court of Appeals is in harmony with the language and concerns of these decisions.

Nobel also purports to see a conflict between the decision of the Court of Appeals and the decision of this Court in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). Pet. for Cert., p. 11. Nobel believes that the Court of Appeals defined the term "reasonable accommodation" as the solution proposed by the employee. In the present case, however, Toledo was never given an opportunity to present a solution to the conflict between his

religious practices and Nobel's employment needs. Rather, when Toledo asked Rodney Plagmann, the Nobel official who interviewed him for the position, if he could contest Nobel's refusal to hire him, he was told by Plagmann to "do what you have to do." The Court of Appeals could not have directed Nobel to accept Toledo's proposed solution because Nobel summarily refused to hire Toledo, without allowing him an opportunity to even make an accommodation proposal.

Similarly, Nobel asserts that the ruling of the Court of Appeals eliminates the "reasonableness inquiry" from refusal to hire cases, because it compels liability where the employer contends that no reasonable accommodation is possible. Pet. for Cert., p. 11. However, the question of reasonableness arises only in a determination of whether an employer's proposed action "reasonably accommodates" the prospective employee's religious activities. The reasonableness to be evaluated is the reasonableness of the employer's proposed accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 68-70.

It is apparent that the reasonableness of an employer's proposed accommodation cannot be evaluated when the employer did not propose an accommodation. Thus, it is not the ruling of the Court of Appeals that removed the "reasonableness inquiry" from the present litigation, but rather Nobel's failure to make any attempt to accommodate Toledo's religious practices before it flatly refused to hire him. Had Nobel made such an attempt at accommodation, the terms of that attempt would have received careful review by the District Court and Court of Appeals.

The analysis utilized by the Court of Appeals is consistent with decisions of this Court, decisions from other circuits, and Nobel's own position before the Court of Appeals. The application of this analysis to the facts of this case does not result in strict liability, and does not raise a significant federal issue warranting review by this Court.

III. THE COURT OF APPEALS' DECISION DOES NOT EXTINGUISH THE DUTY OF AN EMPLOYEE TO COOPERATE WITH ATTEMPTS AT REASONABLE COOPERATION.

The Court of Appeals quoted a portion of this Court's decision in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), finding that an employee has a duty to cooperate with an employer's attempt at accommodation of religious practices, and that the duty is triggered by the employer's initial efforts at accommodation. *Toledo*, 892 F.2d at 1488. The Court of Appeals ruled that Toledo did not breach the duty to cooperate because Nobel did not attempt to accommodate Toledo's religion before it refused to hire him. 892 F.2d at 1488-1489.

Nobel contends that the Court of Appeals' ruling undermines the policy considerations behind the conciliation process, creating an incentive for employees to file administrative discrimination charges and "wait in order to receive back pay without having to perform any work." Pet. for Cert., p. 12. Nobel's position disregards the statutory duty of victims of discrimination to mitigate their lost earnings. 42 U.S.C. §2000e-5(g); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982). An individual charging discrimination will forfeit the right to backpay if s/he

refuses a job substantially equivalent to the one that was denied by the employer. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. at 231-232.

Nobel also attempts to find a conflict between the Court of Appeals' decision and the decisions in *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. den.* 434 U.S. 1039 (1978), and *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982). In fact, the Court of Appeals in the present case endorsed the *Brener* court's observation that the statutory duty to accommodate rests with the employer, and that the employee's duty to cooperate does not arise until the employer satisfies its initial burden. *Toledo*, 892 F.2d at 1488-1489, quoting from *Brener*, 671 F.2d at 146.

Brener and *Mann* both imposed a duty upon an employee to cooperate with an employer's attempts to accommodate the employee's religious practices. *Mann*, 561 F.2d at 1285; *Brener*, 892 F.2d at 146. In the present case, Toledo could not cooperate with Nobel because Nobel made no effort to accommodate Toledo's religious practices with which Toledo could cooperate. The Court of Appeals was, therefore, correct in ruling that Toledo did not breach a duty to cooperate, and this holding is consistent with the principles articulated by the *Brener* and *Mann* courts.

IV. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISION IN *TRANS WORLD AIRLINES, INC. V. HARDISON*

Nobel correctly notes that in *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977), this Court held that

undue hardship was demonstrated when Trans World Airlines showed that the employee's proposed accomodations would result in more than a *de minimis* cost to the company. The District Court cited *Hardison* and utilized its *de minimis* analysis in its ruling. *Toledo*, 651 F.Supp. at 491. The Court of Appeals did the same. *Toledo*, 892 F.2d at 1492.

Nonetheless, Nobel asserts that the Court of Appeals established a new "impossibility" test that greatly exceeds the *de minimis* standard articulated in *Hardison*. Pet. for Cert., p. 14. Similarly, Nobel contends that the Court of Appeals has required "an employer to prove the impossibility of the accommodation in order to establish undue hardship." Pet. for Cert., p. 16.

The Court of Appeals did no such thing. The Court of Appeals repeatedly utilized the concept of "undue hardship" in its analysis of the accommodation issue. *Toledo*, 892 F.2d at 1490, 1492. Indeed, Nobel's own quotations of the Court of Appeals demonstrate that that court was determining whether Nobel could have accommodated Toledo without undue hardship. Pet. for Cert., p. 13-14. As noted above, the Court of Appeals clearly understood that the term "undue hardship" requires an analysis of whether a burden is more than *de minimis*. *Toledo*, 892 F.2d at 1492.

It is apparent, then, that the Court of Appeals was not requiring that Nobel prove that accommodation of Toledo's religious practices was "impossible". Rather, both the Court of Appeals and the District Court engaged in a standard post-*Hardison* analysis of whether accommodation of Toledo's practices would result in more than

de minimis cost. *Toledo*, 892 F.2d at 1492; *Toledo*, 651 F.Supp. at 491.

In the Court of Appeals, Nobel argued that it could not have accommodated Toledo's religious practices without having incurred undue hardship. The Court of Appeals ruled that Nobel did not show that accommodation without undue hardship was impossible. *Toledo*, 892 F.2d at 1492. The Court of Appeals ruling does not, then, embody a new legal standard, but is simply an affirmance of the factual findings of the District Court that Nobel did not meet its burden of proof.

Nobel contends that the accommodation of Toledo's practices that was evaluated by the District Court and Court of Appeals was "proposed" by these two courts. Pet. for Cert., p. 14. In fact, this proposed accommodation was put forth by Nobel as part of its settlement offer to Toledo. The offer was not concocted by the lower courts.

Nobel asserts that the District Court erred in finding that two portions of this accommodation proposal would not create more than a *de minimis* cost. Specifically, Nobel asserts that the cost of replacing Toledo with another employee, should Toledo be unavailable for work because he had attended a Church ceremony the evening before a Sunday upon which work was required, and the disruption of the seniority system by such replacement, constitute more than *de minimis* costs. Pet. for Cert., p. 14-15.

The District Court noted that, given the fact that Toledo attends Church services just two to four times per year, and that Nobel needs Sunday drivers only about five times a year, it was unlikely that there would be a significant number of Sundays that both followed one of

Toledo's Saturday evening Church ceremonies and upon which Nobel required a driver. The District Court found that the payment of any overtime wages under such rare and occasional circumstances would be a *de minimis* cost. *Toledo*, 651 F.Supp. at 491. The District Court also found that Nobel did not prove that it could not replace Toledo without violating the seniority provisions of its contract with the union. *Id.*, 651 F.Supp. at 491.

Nobel did not challenge either of these findings as clearly erroneous in its appeal to the Court of Appeals. Such unchallenged findings do not warrant review by this Court.

Finally, Nobel describes as "speculation" the findings of fact of the District Court, and their affirmance by the Court of Appeals, concerning the hardship that Nobel asserted would result from the accommodation of Toledo's practices that Nobel proposed in its settlement offer. Pet. for Cert., p. 15. Of course, the District Court's findings of fact are not speculation, but a weighing of evidence proffered by the parties. The speculation in this litigation was undertaken not by the courts but by Nobel itself, in an attempt to justify its refusal to hire Toledo. *Toledo*, 892 F.2d at 1492 ("We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship.").

Indeed, before this Court Nobel speculates that Toledo would not have accepted any restriction upon his religious practices even if Nobel had been willing to attempt accommodation of those practices. Pet. for Cert., p. 15. However, neither this Court nor the parties will ever know how Toledo would have responded to an

attempted accommodation when he applied for work because Nobel did not make any attempt at accommodation until the parties were adversaries before the New Mexico Human Rights Commission. Even then, Nobel's purported accommodation was part of an effort to obtain dismissal of Toledo's discrimination charge in its entirety.

The District Court and Court of Appeals applied the proper *de minimis* standard of "undue hardship" to the facts of this case, and reached conclusions that are not clearly erroneous. The conclusions of these courts are in accord with this Court's decision in *Trans World Airlines v. Hardison,* and do not raise important questions of federal law.

V. DRUG TESTING REGULATIONS CITED BY NOBEL DO NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS.

Nobel asserts that this Court should grant review because the ruling of the Court of Appeals is in conflict with regulations of the Department of Transportation, 53 Fed. Reg. 47134 (November 21, 1988). Pet. for Cert., p. 17. This regulation was not in effect at the time that Nobel refused to hire Toledo, and does not mandate testing for peyote. Further, Nobel did not argue the applicability of this regulation to the Court of Appeals.

Nobel refused to hire Toledo on March 18, 1984. The Department of Transportation regulations relied upon by Nobel were not promulgated until November 21, 1988. The new regulations had nothing to do with Nobel's refusal to hire Toledo, and can have no bearing upon the

Court of Appeals' ruling that this refusal to hire violated Title VII.

The Department of Transportation regulations cited by Nobel were published 13 months before the Court of Appeals' decision. Nonetheless, Nobel never brought the regulations to the attention of the Court of Appeals. The Rules of Appellate Procedure set forth a simple mechanism for doing so. Rule 28(j), F.R.A.P.

At any rate, the Department of Transportation regulations are a part of a Departmental program to prescribe testing for five drugs in a number of industries. 53 Fed. Reg. 47002 (November 21, 1988). Peyote is not one of the five drugs for which employees are to be tested. 53 Fed. Reg. at 47005 (to be codified at 49 C.F.R. §40.21(a)); 53 Fed. Reg. at 47148; 53 Fed. Reg. at 47151 (to be codified at 49 C.F.R. §391.81(b)). Additional testing requires further authorization, 53 Fed. Reg. at 47005 (to be codified at 49 C.F.R. §40.21(b),(c)); 53 Fed. Reg. at 47148. Such authorization has not been granted. Further, implementation of a portion of the drug testing regulations relied upon by Nobel has been preliminarily enjoined. *Owner-Operators Indep. Drivers Ass'n v. Burnley*, 705 F.Supp. 481 (N.D.Cal. 1989).

The Department of Transportation drug-testing regulations do not, then, affect or conflict with the holding of the Court of Appeals that Nobel violated Title VII when it refused to hire Toledo in 1984.

VI. THIS COURT'S DECISION IN *EMPLOYMENT DIV'N V. SMITH* DOES NOT AFFECT THE ANALYSIS OF THE DECISION OF THE COURT OF APPEALS.

In *Employment Div'n v. Smith*, ___ U.S. ___, No. 88-1213 (April 17, 1990), this Court ruled that religiously

inspired use of peyote, when illegal under state law, is not constitutionally protected. This ruling can have no impact upon the analysis utilized by the Court of Appeals.

The *Smith* decision concerned only the constitutional protection of religiously inspired conduct that was illegal under Oregon law. In contrast, Toledo's sacramental use of peyote was legal under New Mexico law, N.M.S.A. §30-31-6(D) (1978), and Colorado law, Colo.Rev.Stat. §12-22-317(3) (1985). *See Employment Div'n v. Smith*, slip op. at 30. Religious use of peyote is also legal under Navajo law. 17 Nav.Tr.Code §1201. Because Toledo's religious practices were legal under all relevant law, the First Amendment analysis in *Smith* is irrelevant.

In the *Toledo* opinion, the Court of Appeals noted this Court's grant of *certiorari* in *Smith*. *Toledo*, 892 F.2d at 1492 n.5. The Court of Appeals distinguished *Smith* from *Toledo* on the basis that *Toledo* involved Title VII, not the First Amendment, and that *Toledo* involved conduct that was legal under all relevant state laws. *Id.*

The Court of Appeals was clearly correct in distinguishing *Smith* from *Toledo*. Indeed, Nobel does not rely on, or even cite, the *Smith* litigation in its Petition for Certiorari. This Court's decision in *Smith* cannot affect the analysis in the Court of Appeals' ruling.

CONCLUSION

The decision of the Court of Appeals is based upon an unremarkable Title VII analysis that is consistent with

the decisions of this Court and the other circuits. The decision consists largely of an affirmance of the District Court's findings of fact; these facts are unlikely to recur. The Petition for a Writ of Certiorari should be denied, or the order below summarily affirmed on the merits pursuant to United States Supreme Court Rule 23.1.

Respectfully submitted,

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